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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DR. INGRE RUDOLPH PLANTE; Commissioner of Institutions and Agencies, ANN KLEIN; Medical Director of New Jersey State Hospital, New Jersey Mental Health Commissioner, DR. MARTIN WEINBERG; STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor; SUPREME COURT OF NEW JERSEY, RICHARD J. HUGHES, Chief Justice,

Petitioners,

vs.

ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Did the court of appeals err in creating a constitutional right to treatment in the least restrictive setting for the criminally insane in a case where the plaintiff was currently receiving adequate treatment and his own expert witness testified that he found no evidence of malpractice or any indifference to plaintiff's medical needs and where plaintiff had consistently refused various important forms of psychiatric treatment offered to him?

2. Did the court of appeals err in ordering specific injunctive relief, irrespective of fiscal or budgetary limitations, when plaintiff was currently receiving adequate care and when the relief requested includes the construction of a new Forensic Unit at a cost of several million dollars?

3. Do this Court's decisions in *O'Connor* v. *Donaldson*, *Wood* v. *Strickland* and *Procunier* v. *Navarette*, establishing a qualified good faith immunity for state administrative officials, preclude the awarding of monetary damages when none of the defendants had any personal responsibility for plaintiff's care and did not participate personally or directly in any alleged violation of his constitutional rights and when the rights allegedly violated were not even created until the trial in this case?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 5, 1981.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, not yet reported, is included in this petition as Appendix A. The unreported opinion of the United States District Court appears in this petition as Appendix B. The order and statement of the United States Court of Appeals for the Third Circuit, denying petition for rehearing, is included in this petition as Appendix C. The order of the United States Court of Appeals for the Third Circuit, granting stay of the mandate, is included in this petition as Appendix D.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 5, 1981. A timely petition for rehearing was denied on March 6, 1981 and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is therefore invoked under 28 U.S.C. §1254(1) to review a judgment of the Court of Appeals by issuance of a writ of certiorari.

Statement of the Case

Plaintiff Scott has been confined in the Forensic Unit of Trenton Psychiatric Hospital since 1955, following his indictment for murder and a finding that he was mentally incompetent to stand trial. (Exhibit D-6). Since that time he has had a plethora of hearings held before a State court judge concerning his mental condition, at which he was always represented by an attorney, and each hearing has resulted in a finding that he is still mentally

ill and dangerous. (Exhibits D-1, D-3, D-6; I T112-20 to I T114-11).* His most recent hearing, held on June 11, 1980 and July 2, 1980 and including testimony by two psychiatrists, resulted in a judicial determination that he was still "a danger to himself and to others by reason of his mental illness, schizophrenia, paranoid type," and his confinement at the Forensic Unit was continued "until further order of this Court." Pursuant to *State* v. *Fields,* 77 N.J. 282, 398 A.2d 574 (1978), and *State* v. *Krol,* 68 N.J. 236, 344 A.2d 289 (1975), he will receive an annual hearing in State court at which the State must show that he is still so dangerous by reason of his mental illness that he remains in need of confinement in the Forensic Unit. And, the State must prove these facts by clear and convincing evidence. *In the Matter of Thomas Sclefo, Jr.,* 170 N.J. Super. 394, 406 A.2d 973 (App. Div. 1979).

In this case, plaintiff seeks monetary, declaratory, injunctive and *habeas corpus* relief pursuant to 42 U.S.C. §1983 against various State administrative officials for unconstitutional conditions and inadequate psychiatric and medical treatment during his judicially ordered commitment to the Forensic Unit, as well as for defendants' failure to release him from confinement. The defendants

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* The six transcripts for the five days of trial will be identified as follows:

I May 31, 1979
II June 1, 1979
III June 6, 1979
IV June 7, 1979
V June 13, 1979 (summations and charge to jury)
VI June 13, 1979 (verdict of jury)

Thus, for example, IT112-20 refers to the transcript for May 31, 1979, at page 112, line 20.

originally were the State of New Jersey, Governor Brendan T. Byrne, the Supreme Court of New Jersey, former Chief Justice Richard J. Hughes, Ann Klein, Commissioner of the New Jersey Department of Human Services, and two former Chief Executive Officers and Medical Directors of Trenton Psychiatric Hospital, Dr. Inge R. Plante and Dr. Martin Weinberg. Plaintiff's claims for monetary damages were tried before a jury over five days. Testimony was presented by plaintiff, plaintiff's expert witness Dr. Robert Sadoff, a psychiatrist, and defendants' expert witness Dr. Harvey Musikoff, a forensic psychologist who had been Chief of the Forensic Unit. In addition, Scott's complete medical records were introduced into evidence.

Scott's original diagnosis when first admitted to the Forensic Unit was schizophrenia with paranoid features and he still suffers from that mental illness. (II T7-21 to 24). Plaintiff's expert witness, Dr. Sadoff, testified that Scott was still actively delusional and had hallucinations and that it would be very difficult to predict his behavor. (II T7-23 to II T8-10). Dr. Musikoff, defendants' expert witness who had been part of Scott's treatment team, testified that he agreed with the diagnosis of schizophrenia with paranoid features. (III T107-22 to 25). He stated that he felt that Scott was "very dangerous" and that because of Scott's dangerousness and delusional thinking he should remain in the Forensic Unit, since the structure of the unit and its security procedures keep him from acting out violently. (III T108-4 to 5, III T109-24 to III T110-14).

With regard to the care and treatment provided Scott while at the Forensic Unit, Dr. Sadoff testified that he found no evidence of malpractice or any indifference to his medical needs or any evidence that the defendants

had harmed him. (II T22-8 to 16, II T23-12 to 15). He also stated that Scott's treatment was typical of persons suffering from a similar mental illness, at a similar point in time, in a state institution for the criminally insane like the Forensic Unit. (II T22-17 to 22). Dr. Musikoff testified that, since Scott's commitment in 1955, there had been an adequate attempt to treat him for his mental illness. (III T114-12 to 16).

Dr. Sadoff testified that Scott had refused various important forms of psychiatric treatment including group therapy and medication and that as long as he continued to do so there was little that can be done for him. (II T23-1 to II T24-16). Dr. Musikoff reported that Scott participated in his treatment program only in "a very, very minimal way." (III T53-10 to 15). He stated that, as a result of this refusal to participate in treatment, prospects for improvement of Scott's mental condition were "nil." (III T57-24 to III T58-9). He pointed out that if Scott had not refused to participate in treatment programs he would have had more opportunities to work with the members of the treatment team, both individually and as a group. (IV T23-20 to IV T24-14). Plaintiff himself admitted that he had refused various major forms of treatment including group therapy, occupational therapy, and psychotropic medication, as well as psychological testing. (I T79-12 to I T80-7, I T103-20 to I T104-13, I T90-15 to 22, I T119-1 to 10).

With regard to his treatment and care at the Forensic Unit, Scott testified that he has a treatment team which includes a teacher, social worker, psychologist, several nurses, and other staff and that the treatment team began working with him two or three years ago and now is scheduled to meet on a weekly basis. (I T125-25 to I T126-15, I T133-13 to 22). He also reported that he had access

to various forms of medical care in the Forensic Unit and has not suffered from any major medical problems during his confinement at the Forensic Unit, nor has he ever been harmed during his stay there. (I T65-2 to I T71-25, I T132-16 to I T133-2).

Prior to submitting the case to the jury the district court dismissed defendants State of New Jersey, Governor Byrne, Supreme Court of New Jersey, and Chief Justice Hughes. (Aa50). The Court also dismissed all of plaintiff's State law claims, which included false imprisonment, assault and battery, and malpractice. (Aa50). The case was submitted to the jury on three issues, constitutional right to treatment, constitutional right to refuse treatment*, and constitutional right to adequate living conditions, and the jury returned a verdict for the plaintiff on his claims of deprivation of adequate treatment and physical conditions violative of due process. (Aa50-51). The jury awarded $15,000 compensatory damages and $10,000 punitive damages jointly against defendants Klein, Weinberg and Plante. (Aa51). The jury found for defendants on plaintiff's claim that he was forced to undergo treatment against his will. (Aa50-51). The district court reserved judgment on the requests for injunctive relief not presented to the jury.

Defendants then moved pursuant to Fed.R.Civ.P. 50 and 59 for judgment notwithstanding the verdict, or in the alternative for a new trial. On January 8, 1980 the district court issued its decision vacating the punitive damages award, reducing the compensatory damages award to the nominal sum of $1, denying plaintiff's petition for *habeas corpus* and for alternative forms of injunctive relief, and denying defendants' motion for a new trial. In granting

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* Plaintiff has not appealed from the adverse jury verdict on this issue. (Aa16).

judgment notwithstanding the verdict, the district court concluded that "an award of punitive damages in the instant case is totally without evidentiary basis" and thus vacated that portion of the jury verdict. (Aa53-54). With respect to compensatory damages, the court observed that plaintiff suffered no real compensable injury and that there was no justification to hold defendants Klein, Weinberg or Plante liable for money damages. (Aa57). On these bases, it reduced the compensatory damages award to "nominal damages of $1" and thus did not address the question of when any right to treatment was constitutionally recognized. (Aa57-58).

The district court denied plaintiff's petition for *habeas corpus,* based upon the numerous hearings which have recommended his continued confinement and the absence of testimony which would justify his release. (Aa58-59). Plaintiff's request for various forms of injunctive relief, including the erection of a new facility, establishment of a law library and amendment of the rules of the New Jersey Supreme Court, were each denied. (Aa59-60). The district court concluded that the circumstances and facts of this case did not "warrant its interference with either the legislative or judicial branches of the government of the State of New Jersey." (Aa60).

Both sides appealed from the district court's decision and oral argument was heard before the court of appeals on September 18, 1980. On February 5, 1981 the court of appeals issued a 41-page opinion, vacating the district court's decision, ordering a new trial on the damages claims and ordering the district court to fashion "an appropriate decree" providing Scott with "specific relief from its [the Forensic Unit's] intolerable conditions." (Aa32). In reaching its decision the court of appeals created a constitutional right to treatment in the least restrictive set-

ing for the criminally insane, as well as the mentally ill, and refused to accept the district court's finding that, under the facts of this case, this Court's decisions setting forth a limited good faith immunity for state administrative officials precluded the awarding of non-nominal damages against the defendants. The court of appeals also ordered the district court to conduct a hearing on whether plaintiff could be transferred out of the Forensic Unit, despite an adverse decision on that very issue by a State court in July 1980.*

Defendants moved for rehearing and on March 6, 1981 that request was denied by a four-three vote. (Aa62-63). Three judges joined in a Statement Sur Petition written by Judge Adams (the author of the court's *en banc* opinion in Romeo) that:

> "Whether the standards developed in *Romeo* v. *Youngberg*, No. 78-1982 (3d Cir. Nov. 25, 1980) (en banc) for the involuntarily committed mentally retarded should be applied across-the-board to the involuntarily committed mentally ill who have been incarcerated following a finding of not guilty by reason of insanity, as well as what the exact contours of official immunity and the 'good faith' defense should be in this context are important questions which I believe merit the attention of the full court."

Defendants moved pursuant to Fed.R.App.P. 41(b) for a stay of the mandate pending submission of this application for certiorari. On March 16, 1981 the court of appeals granted the motion, staying the mandate until April 12, 1981. (Aa64).

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* That decision has been appealed by plaintiff to the Superior Court of New Jersey, Appellate Division.

Reasons for Granting the Writ

The court of appeals' creation in this case of a constitutional right to treatment in the least restrictive setting for the criminally insane and its rejection of the good faith immunity for state administrative officials who had no direct involvement in the alleged violation of plaintiff's rights has no basis in the decisions of this Court and is in conflict with lower federal court decisions and thus should be reviewed by this Court because these highly controversial legal conclusions will have an extremely detrimental effect on the operation of public mental health facilities throughout the United States.

In this case the court of appeals has created constitutional rights for the criminally insane and, for all practical purposes, eliminated the qualified good faith immunity of state administrative officials. The court of appeals' overruling of the district court's holding that the facts and law governing this case prevented the awarding of nonnominal damages against the defendants totally ignores this Court's decisions in *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975); *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975); and *Procunier* v. *Navarette,* 434 U.S. 555 (1978). In establishing a constitutional right to treatment for the dangerous mentally ill, it has decided the issue left open by this Court in *O'Connor* v. *Donaldson, supra,* 422 U.S. at 573 (1975), and ignored the concurring opinion of the Chief Justice in that case, as well as several lower federal court decisions which raise serious questions concerning the viability of such a right.

The Third Circuit's creation of a constitutional right to treatment for the mentally ill and criminally insane ignores the substantial legal, clinical and fiscal barriers to the judicial enforcement of such a right. The legal basis for any constitutional right to treatment, based upon a *quid pro quo* theory, has been questioned by the Chief Justice in *O'Connor* v. *Donaldson*, and by several lower federal courts, including the court of appeals which created the right. The difficulties in evaluating any right to treatment are legion and several federal courts have raised serious questions as to whether the courts are capable of delving into such matters. Perhaps most importantly, the appellate court has indicated that the constitutional right to treatment could require the state to build an entire new facility to satisfy one patient's claims and has stated that fiscal constraints are not to be considered. If these assertions are correct, then the court's establishment of this right will have a disastrous effect on state budgets and could cause a state to consider discharging all the dangerous mentally ill in order to avoid the type of relief suggested by the Third Circuit in this case. See *Welsch* v. *Likins*, 550 F.2d 1122, 1132 (8th Cir. 1977). There are presently several thousand patients residing in public psychiatric hospitals in New Jersey who are both mentally ill and dangerous and the potential ramifications of the Third Circuit's sweeping analysis are practically unlimited, especially in light of their suggestion that the right to treatment could require the State to build a new facility. Before a confrontation between the federal judiciary and the states is reached in this area, or the states adopt the drastic remedy of closing all their facilities for the mentally ill and criminally insane, the panel's far reaching and novel conclusion should be considered by this Court.

The court of appeals' rejection of the qualified good faith immunity will have similarly devastating effects on

the operation of the State mental health system. If this decision is left unchanged any public official involved in any way in administering, supervising or delivering public health care or social services is subject to liability for compensatory and punitive damages solely because of the failure of a state legislature to fully fund public health care and social service programs and facilities.* The decision in this case, coupled with the court of appeals' decision in *Romeo* v. *Youngberg,* will make it virtually impossible for a state to attract qualified professionals to fulfill administrative positions.

Because the issues in this case are of exceptional public policy importance**, and because the Third Circuit has ignored or misapplied established caselaw governing these issues, this Court should review the highly controversial and unsupported conclusions of the court of appeals in this case.

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* For example, Commissioner Klein is responsible for administering an umbrella human services agency which delivers services to 12,000 persons in institutions for the mentally ill or mentally retarded. Under the standards articulated in this case and *Romeo,* she is potentially liable to each of these clients for compensatory and/or punitive damages solely because of the Legislature's failure to adequately fund her Department.

** Circuit Judge Adams (who wrote the court of appeals' *en banc* opinion in *Romeo* v. *Youngberg, supra*) filed a statement dissenting from the court of appeals' denial of defendants' petition for rehearing in this case, joined in by two other circuit judges, which argued that the issues raised "are important questions which I believe merit the attention of the full court." (Aa63).

A. Certiorari should be granted to resolve the significant question expressly left open in *O'Connor* v. *Donaldson* as to whether the dangerous mentally ill have a constitutional right to treatment.

The panel decision in this case created a constitutional right to treatment for the mentally ill, and then applied it to the criminally insane such as plaintiff, simply by asserting that "[i]n *Romeo* v. *Youngberg*, No. 78-1982 (3d Cir. November 25, 1980) (en banc) we held that the involuntarily committed mentally retarded have a constitutionally protected right to treatment, and the analysis of that case is for Fourteenth Amendment purposes equally applicable to the involuntarily committed mentally ill. *Id.*, Slip op. at 32 n.53." (Aa16-17). This leap in legal reasoning was made despite that court's statement in *Romeo** that "[i]t is important to remember, however, that insofar as a constitutional right to treatment is concerned, there are critical differences between the mentally ill and the mentally retarded. Cf. *Kremens* v. *Bartley*, 431 U.S. 119, 135-36 (1977)." (Slip op. at p. 48). Such a significant legal conclusion, even if correct, should not be reached by a single panel of the court of appeals but should be decided by this Court.

No additional case law support was provided for this farreaching result, which was specifically not reached by this Court in *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 573 (1975) nor by the Third Circuit in *Scott* v. *Plante*, 532 F.2d 939, 947 (3d Cir. 1976). Since that time, no decision by this Court has addressed that issue, and the same court of appeals which created this right has also expressed serious doubts concerning its existence. *Morales* v. *Turman*, 562 F.2d 993, 998 (5th Cir. 1977). In fact, one federal

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* A petition for certiorari has been filed by the defendants in that case. U.S.S.Ct. No. 80-1429 (filed February 23, 1981).

district court has concluded that "the failure to properly treat one single person does not allege a violation of the constitutional right to treatment." *Patton* v. *Dumpson*, 425 F.Supp. 621, 624 (S.D.N.Y. 1977).

In establishing a constitutional right to treatment, the Third Circuit has ignored the substantial legal, clinical and fiscal barriers to the establishment and implementation of such a right. The Chief Justice, in *O'Connor* v. *Donaldson, supra,* 422 U.S. at 587-8, and several lower federal courts have expressed serious doubts as to the *quid pro quo* rationale for a right to treatment. See *Rone* v. *Fireman*, 473 F.Supp. 92, 119 (N.D. Oh. 1979). Another federal court has pointed out that "[t]he difficulties are legion in assessing a 'right to treatment' from defining mentally ill, adequacy or treatment itself, to determining whether treatment is necessary or helpful or the condition is incurable, and to setting standards of care." *Woe* v. *Mathews*, 408 F.Supp. 419, 429 n.23 (E.D. N.Y. 1976). And, the court of appeals which created the constitutional right to treatment has more recently observed that "[t]o attempt to specify the type of treatment that should be provided may well be beyond the competence of federal judges." *Morales* v. *Turman*, 562 F.2d 993, 998 (5th Cir. 1977).

Perhaps the most critical error of the Third Circuit in creating this right was its assertion that budgetary constraints or insufficient funding should not be considered in fashioning a remedy to implement plaintiff's right to treatment. This approach is in direct conflict with that circuit's *en banc* holding in *Romeo* v. *Youngberg, supra,* that in evaluating a treatment program "[t]he state should be permitted to adduce evidence of security concerns, administrative necessities and *fiscal constraints* in the course of explaining its adoption of the challenged program." Slip op. at pp. 33-4 (emphasis added). Further-

more, the appellate court's sweeping approach to this complex issue ignores the hard fact of life that the State fisc must be shared with a large number of competing needs (such as welfare and health care for the poor, education for handicapped children, care and treatment for the 8,000 mentally retarded and developmentally disabled in State institutions, and treatment for the 4,000 civilly committed patients in State psychiatric facilities). Despite these considerations the Third Circuit has ordered the district court to implement plaintiff's right to treatment regardless of cost, and suggested that relief such as the construction of a new Forensic Unit at a cost of millions of dollars be considered. The court has ignored the dangers of judicial intrusion into this area, which has traditionally been left to the states, and not only created constitutional rights never recognized by this court but extended them to the criminally insane. Such a result was particularly inappropriate in this case, given the substantial evidence in the record that plaintiff's current treatment was adequate and where plaintiff has consistently refused most major forms of treatment, with his own expert testifying that there was little that could be done for him as long as he continued to refuse.

Furthermore, even assuming *arguendo* that the court of appeals was correct in holding that Scott has a constitutional right to treatment in the least restrictive setting, the steps which it ordered the district court to take to protect that right raise serious questions under principles of *res judicata*, abstention and comity between the federal and state judiciaries. Specifically, the court ordered that another hearing should be conducted on the question of whether Scott should continue to be confined in the Forensic Unit or transferred to another hospital within the State mental health system. This dis-

position failed to take proper account of the fact that Scott is confined at the Forensic Unit pursuant to an order of the State courts, not administrative action of the defendants, and that the State courts conduct annual periodic reviews to determine whether such placement continues to be appropriate. In Scott's case, the most recent such periodic review was conducted in June and July 1980. This consisted of a two-day hearing before a State court judge which resulted in a determination that Scott was still so dangerous that he should not be either released or transferred to another psychiatric facility. Furthermore, there was a right of appeal within the State appellate system from this order. Plaintiff has so appealed but no decision has yet been rendered by the appellate court. The practical effect of this part of the court of appeals' decision is to circumvent the State judicial process and instead to direct the district court to readjudicate precisely the same issue as was recently decided by the State courts. See *Allen* v. *McCurry*, 449 U.S. ——, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980).

In sum, the Third Circuit has created a constitutional right to treatment for the dangerous mentally ill despite extensive caselaw raising serious questions about both the legal basis of such a right and the ability of the judiciary to effectively involve itself in such issues. This novel legal conclusion was reached despite its tremendous fiscal ramifications and despite the fact that the district court concluded that plaintiff's current treatment was adequate. The Third Circuit's failure to heed the warning of other federal courts on this issue and its creation of a constitutional right despite clear evidence that the issue should not be reached in this case should be reviewed by this Court.

B. Certiorari should be granted because the court below has misinterpreted, and for all practical purposes eliminated, the qualified good faith immunity of state administrative officials set forth in *O'Connor* v. *Donaldson* and *Wood* v. *Strickland*.

The panel's decision in this case ignores the qualified good faith immunity of state mental health officials set forth by this Court in *O'Connor* v. *Donaldson, supra,* 422 U.S. at 577.* The test for immunity is that damages cannot be awarded unless the defendant "knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the constitutional rights of [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff] . . . For purposes of this question, an official has, of course, no duty to anticipate constitutional develop-

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* The court of appeals seeks to avoid deciding the important legal issues posed by this case, such as the scope of any constitutional right to treatment or the applicability of the qualified good faith defense of state administrative officials to the facts of this case, by asserting that defendants did not object to a particular instruction nor submit any instructions which were inconsistent with the instruction given. (Aa15-24). However, this statement is totally inaccurate. Not only did defendants submit instructions which were in conflict to and inconsistent with the instruction given by the district court on each of the issues discussed by the panel, but, furthermore, at the close of its instructions to the jury the district court stated that "[a]ll those requests to charge which I have not Charged, or changed and put into my own words, I refuse to Charge, so that will make your record on your request." This ruling by the court was sufficient to preserve defendants' right to appeal the district court's failure to adopt any of their proposed instructions. *Stilwell* v. *Hertz Drivurself Stations,* 174 F.2d 714, 715 (3d Cir. 1949). *Alcaro* v. *Jean Jordeau, Inc.,* 138 F.2d 767, 771 (3d Cir. 1943).

ments." *Id.* at 577. Despite the fact that the Third Circuit established a constitutional right to treatment for the criminally insane for the first time in this case and the only other case so holding was a federal district court in 1979, and despite the fact that this Court has never held that the mentally ill, much less the criminally insane, have a constitutional right to treatment, the appellate court refused to accept the district court's conclusion that the defendants were entitled to the good faith immunity set forth in *O'Connor* v. *Donaldson.* This result is in direct contravention of that court's decision in *Nelson* v. *Reese,* 598 F.2d 822 (3rd Cir. 1979) and decisions by this Court in *Procunier* v. *Navarette, supra, Wood* v. *Strickland, supra,* 420 U.S. at 322, and *O'Connor* v. *Donaldson, supra,* which hold that a state official cannot be found to have acted in disregard of constitutional rights if, at the time in question, there was no binding authority which established the asserted constitutional right. A similar analysis applies to the conditions claim, where the district court applied the Fourteenth Amendment standard of *Bell* v. *Wolfish,* 441 U.S. 520 (1979), to confinement of the criminally insane. The district court's ruling was the first time the Fourteenth Amendment standard has been applied to the criminally insane to evaluate their conditions of confinement and therefore damages could not have been awarded for defendants' failure to meet a standard which was only established in this case.

Furthermore, it has been clearly established that a supervisory official, such as each of these defendants, is only liable under 42 U.S.C. §1983 "if he is personally involved in the alleged wrongdoing." *Donaldson* v. *Hovanec,* 473 F.Supp. 602, 608 (E.D. Pa. 1979) (citations omitted). See also *Hampton* v. *Holmesburg Prison Officials,* 546 F.2d 1077, 1082 (3d Cir. 1976); *Coggins* v. *McQueen,* 447 F.Supp. 960, 966-7 (E.D. Pa. 1978). In this case plaintiff has sued

two former Chief Executive Officers and Medical Directors of Trenton Psychiatric Hospital, and the Commissioner of the Department of Human Services. He has not named as a defendant his treating psychiatrist, any of the members of his treatment team, or even the head of the Forensic Unit. Since plaintiff has not presented any evidence* that the three named defendants had any personal or direct responsibility for his care and treatment or participated personally or directly in the alleged violations of his constitutional rights, they should have been dismissed as defendants. *Donaldson* v. *Hovanec, supra; Hampton* v. *Homesburg Prison Officials, supra; Coggins* v. *McQueen, supra.* The failure to dismiss these three defendants constitutes a mistake of law which should be reversed by this Court and judgment entered on behalf of defendants on all money damages claims.

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* Plaintiff's assertion that defendants had "both constructive and personal knowledge" of the alleged violations of his constitutional rights is unsupported in the trial record. In fact, the only contact between plaintiff and defendants Klein, Weinberg and Plante consisted of: several letters which dealt solely with plaintiff's refusal to take medication, a letter to Dr. Plante requesting that Dr. Elizondo be taken off his case, a letter to Commissioner Klein complaining that his mail was being searched, and a letter to Dr. Weinberg complaining of smoke in the day room and requesting his release. Each of those inquiries, written by Scott or his mother, was promptly answered by the hospital or departmental staff. Exhibits D-1, D-3.

Furthermore, none of these defendants had any direct responsibility for the care and treatment of plaintiff at the Forensic Unit, nor did any of them ever even work on that unit. (IIIT74-7 to 9; IIIT75-10 to 12). Scott himself testified that he had never met Commissioner Klein. (IT121-10 to 12). He also stated that he never met Dr. Plante or Dr. Weinberg and that neither of them ever worked directly with him in terms of his treatment program. (IT121-22 to IT122-20).

Since defendants have not taken any action within the scope of their official responsibility to violate his constitutional rights, they cannot be held liable for damages unless a malicious intent to injure plaintiff is shown. *O'Connor* v. *Donaldson, supra,* 422 U.S. at 577. *Nelson* v. *Reese, supra,* 598 F.2d 826-7. No malicious intent has even been asserted by plaintiff and since none of the defendants ever met him or participated in his treatment program. Plaintiff himself testified that he had not been harmed during his confinement at the Forensic Unit and the various attempts by staff at the Forensic Unit to treat him have already been outlined at pages 4-6, *supra.*

In light of the lack of any evidence that the defendants took action which they knew or should have known would violate plaintiff's rights or maliciously intended to injure him or violate his rights, they were clearly entitled to the good faith immunity as a matter of law. *Procunier* v. *Navarrette, supra,* 434 U.S. at 562-5; *Nelson* v. *Reese, supra,* 592 F.2d at 825-6. Such a conclusion is particularly appropriate in this case, where plaintiff's claims relate to a lack of fiscal and staff resources and not to any attempt by defendants to injure him or violate his rights. The district court acknowledged that this would be the proper result when, in response to defendants' motion for judgment notwithstanding the verdict, it reduced the damages award to "nominal damages of $1" and observed: "In integrating the facts and the law which governs the grant of monetary damages to aggrieved plaintiffs, there is no justification either with regard to lack of medical treatment or living conditions for choosing these or any other defendants to be liable for monetary damages" (Aa57). There is no basis in either the facts or law governing this case for the court of appeals to have vacated this ruling by the district court.

The court of appeals also found that the Eleventh Amendment did not bar retroactive monetary damages against defendants in this case. (Aa36). However, this Court has specifically held that this amendment bars a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury. *Edelman* v. *Jordan*, 415 U.S. 651, 662-3 (1974). It is also well-established that this immunity extends to individual state officials and agencies where the state is the real party in interest and the action is in essence one for the recovery of money from the state. *Id.* at 663. This principle of sovereign immunity was recently reaffirmed by this Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979), and the Third Circuit in *Skehan* v. *Bd. of Trustees of Bloomsburg State College*, 590 F.2d 470, 488-91 (3d Cir. 1978). There have been no allegations or proofs in this case that defendants acted outside their official capacites and in fact the record reflects repeated efforts by the defendants to obtain increased funding from the New Jersey Legislature for the Forensic Unit. (Aa42; Exh. D-5, III T61-4 to III T62-24). Thus, monetary damages against these State officials are clearly barred by the Eleventh Amendment in this case. *Alabama* v. *Pugh*, 438 U.S. 781 (1978), *Edelman* v. *Jordan, supra.*

Perhaps the most inexplicable and unsupportable portion of the court of appeals' decision in this case concerns the awarding of punitive damages. The district court vacated the jury's awarding of $10,000 punitive damages because there was "no evidence that defendants acted with 'impermissable motivation or . . . disregard' of plaintiff's constitutional rights to such an extent that they should be subjected to a judgment for punitive damages" and "an award of punitive damages is totally without evidentiary basis." (Aa53-54). Despite their admission that

"we nonetheless confess to uneasiness about imposing exemplary damages against these defendants based on the existing record" and their acknowledgement that the current record could not support a finding of punitive damages, the appellate court ordered a new trial on this issue because plaintiff was entitled to "a more meaning ful opportunity to prepare his case against Klein and the other individual defendants through interrogatories or depositions." (Aa42-44). In light of the fact that counsel for the plaintiff was appointed in November 1977 and the trial was not begun until May 1979, this reversal of the district court's clear finding that there was no evidentiary basis for a punitive damages award appears to simply offer plaintiff a second opportunity to obtain punitive damages

* * *

In sum, the court of appeals' decision in this case is in direct conflict with the opinions of this Court establishing a qualified good faith immunity for state administrative officials, and creates constitutional rights for the criminally insane which have no support in lower federal court decisions or the caselaw of this Court. If left unchanged, the decision in this case will have an extremely detrimental effect on the operation of public institutions for the mentally disabled and will make it virtually impossible for states to hire qualified professionals or to administer state programs for the mentally disabled. The court of appeals' misinterpretation of the established law governing these novel issues of extreme public policy significance and its failure to apply the appropriate legal standards to the facts of this case should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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On the Petition.

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1314/1315 and 80-1596

ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

vs.

DR. INGRE RUDOLPH PLANTE; Commissioner of Institutions and Agencies, ANN KLEIN; Medical Director of New Jersey State Hospital, New Jersey Mental Health Commissioner, DR.MARTIN WEINBERG; STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor; SUPRENE COURT OF NEW JERSEY, RICHARD J. HUGHES, Chief Justice,

ALLEN B. SCOTT,

Appellant in Nos. 80-1314 and 80-1596,

DR. INGRE RUDOLPH PLANTE, *et al.*,

Appellants in No. 80-1315.

Appendix A

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 73-1052)

Argued September 18, 1980

Before: GIBBONS, WEIS and SLOVITER, *Circuit Judges*

(Opinion filed February 5, 1981)

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(Argued)
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*Attorneys for Dr. Ingre Rudolph
Plante, Ann Klein, Dr. Martin Weinberg*

Appendix A

Opinion of the Court

Gibbons, Circuit Judge.

Allen Bodine Scott appeals, and certain defendants cross-appeal, from a final judgment which disposed of all Scott's claims after trial of his numerous complaints charging violations of his civil rights. Several of those claims were submitted to a jury, which returned a verdict in his favor on two of them and in favor of the defendants on one. On a post-trial motion the district court granted partial relief from the verdicts in Scott's favor. Those claims that were not submitted to the jury were tried to the court, which denied all requests for injunctive, declaratory and habeas corpus relief. What remains is a judgment on the jury verdict of one dollar nominal damages for violation of Scott's constitutional rights. We vacate and remand for further proceedings consistent with this opinion.

I.

Scott has been involuntarily confined to the Vroom Building, a maximum security section of the Trenton State Psychiatric Hospital, for approximately 25 years. In 1954 he was indicted by a grand jury in Burlington County, New Jersey, for the murder of his grandmother. In February 1955 a hearing was held in Burlington County in which a jury determined that he was mentally incompetent to stand trial, and an order was entered that he be removed from the County Jail and confined to Trenton State Hospital "until such time as he may be restored to reason, but not to be released from such confinement ex-

cept on the order of this court."[1] Scott was placed in the Vroom Building, where he has remained continuously, except for brief periods when he was returned to Burlington County to stand trial on the indictment. No trial ever took place. On October 7, 1968 the indictment was dismissed

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[1] The hearing was held pursuant to N.J.S.A. 2A:163-2 (repealed 1978) which read in relevant part:

> If any person in confinement under commitment, indictment or under any process, shall appear to be insane, the assignment judge, or judge of the county court of the county in which such person is confined may, . . . institute an inquiry and take proofs as to the mental condition of such person. . . . It shall be competent for the judge, if sitting without a jury, or the jury, if one is impanelled, to determine not only the sanity of the accused at the time of the hearing, but as well the sanity of the accused at the time the offense charged against him is alleged to have been committed.
>
> . . . .
>
> If it shall be determined after hearing as aforesaid, that the accused was insane at the time the offense charged against him is alleged to have been committed, the charge against him shall be dismissed on this ground and the records of the proceedings so noted. In this event, the judge or jury, as the case may be shall also find separately whether his insanity in any degree continues, and, if it does, shall order him into safe custody and direct him to be sent to the New Jersey state hospital at Trenton, to be confined as otherwise provided by law, and maintained as to expense as is otherwise provided for the maintenance of the criminal insane, until such time as he may be restored to reason, and no person so confined shall be released from such confinement except upon the order of the court by which he was committed. This section shall not be construed to prevent the use of the writ of habeas corpus.

on the ground that Scott was insane when the offense was committed. Upon the dismissal of the indictment he was returned to Trenton State Hospital "until the further order of [the Burlington County] Court."[2]

In July of 1973 Scott filed in the District Court the first of a series of pro se complaints addressed to the fact and conditions of his confinement in the Vroom Building. By December 30, 1974 five such complaints had been filed. Scott repeatedly requested appointment of counsel pursuant to 28 U.S.C. § 1915(d), but all such requests were denied. Early in 1975 all his complaints were summarily dismissed and Scott appealed. We granted a motion for a certificate of probable cause, 28 U.S.C. §2253, and appointed counsel. In *Scott* v. *Plante*, 532 F.2d 939 (3d Cir. 1976), we reversed. Reviewing his complaints and the pleadings and affidavits on file, we discerned five separate claims:

> 1. That he had been subjected to the involuntary administration of psychotherapeutic substances, 532 F.2d at 945;
>
> 2. that he was being confined to the Vroom Building without treatment, 532 F.2d at 947;
>
> 3. that the physical conditions at the Vroom Building subjected him to violations of federally protected rights, 532 F.2d at 947;

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[2] *See* N.J.S.A. 2A:163-2 (repealed 1978). The legal problems arising out of the order incarcerating a defendant found not guilty by reason of insanity are discussed in our prior opinion. *Scott* v. *Plante*, 532 F.2d 939, 948-49 (3d Cir. 1976). The current state law provisions, codified at N.J.S.A. 2C:4-6 (Supp. 1980), grant the judge discretion to commit civilly the accused to "an appropriate institution."

4. that his confinement in the Vroom Building after the dismissal of the indictment was unconstitutional, 532 F.2d at 948; and

5. that the procedures by which New Jersey determined from time to time that his confinement must continue did not meet minimum federal due process requirements. 532 F.2d at 949.

We held that the district court erred in granting summary judgment on Scott's involuntary medication claims, and in granting a Rule 12(b)(6) dismissal on each of the remaining claims. In remanding for further proceedings we suggested that his request for the appointment of counsel pursuant to 28 U.S.C. § 1915(d) be given serious consideration. 532 F.2d at 950.

II.

This court's judgment reversing dismissal of Scott's complaints was received by the District Court on April 21, 1976. On August 17, 1976 the court appointed Michael J. Weintraub, Esq. to represent him. Scott was dissatisfied with this appointment, and moved that the court dismiss Mr. Weintraub, and appoint instead David Ferleger, Esq. of the Mental Patient Civil Liberties Project in Philadelphia. On September 2, 1976 that motion was denied. No progress was made in disposing of the case for a considerable period. Meanwhile Scott filed pro se applications for interim relief in the form of the appointment of a manager to run Trenton State Hospital and stop the abuses of which he complained, and for a change of venue. On November 21, 1977 an order was entered:

1. Michael J. Weintraub, Esq., of 227 East Hanover St., Trenton, N.J. 08608 is appointed as guard-

ian ad litem for the plaintiff, Allen Bodine Scott, for these consolidated actions, and is to serve in that capacity as well as his attorney.

2. The stay of these consolidated proceedings pending appointment of a guardian ad litem is vacated.

3. The requirement that a single amended complaint be prepared and filed is vacated, but without precluding the taking of that step at or before entry of pretrial order.

4. The consolidated cases will be reinstated to the active civil calendar.

The order is unusual in several respects. First, there is nothing of record disclosing by what procedure or on what authority the court acted in appointing a guardian ad litem.[3] Second, there is no record of any order staying the proceedings pending such an appointment. Third, there is no record of an order requiring the filing of a single amended complaint. However, the absence of significant docket entries between September 2, 1976 and November 21, 1977 suggests that some action was taken by the court to stay the cases for reasons unknown.

On January 25, 1978 Michael J. Weintraub filed an amended complaint, bearing the docket numbers of the

[3] There is a docket entry on April 12, 1976 referring to an "order to show cause reappointing two independent expert witnesses, who are psychiatrists, to examine the plaintiff, etc." The certified record, however, lists this document (and many others) as "missing." There is no docket entry or record document disclosing any disposition of the order to show cause.

five consolidated cases which were before us on Scott's prior appeal. The prayers for relief of the amended complaint are quoted in the margin.[4] The factual allegations,

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[4] WHEREFORE, plaintiff demands that this Court:

A. Issue an order that the plaintiff be released since his confinement is illegal in that the standard applied in his commitment hearing was a liberal one whereas the standard applied in determining his release has been a more stringent test;

B. Ordering that the plaintiff be released from his confinement for the failure of the defendants to treat or otherwise attempt to rehabilitate the plaintiff;

C. In the event that this Court does not find that the plaintiff is entitled to release as requested in paragraphs A & B, that this Court enter an Order transferring the plaintiff to the civil section of the hospital in accordance with the requirement that the least restrictive means of confinement be utilized;

D. Enter a declaratory judgment that the utilization of a less stringent test for the plaintiff's original commitment and the utilization of a more stringent test for his release to be violative of the plaintiff's rights to due process under both the United States and New Jersey State Constitutions;

E. Enter a declaratory judgment that the standard of proof to be applied in release hearings in determining whether or not the plaintiff is either a danger to himself or to others be that standard of proof beyond a reasonable doubt;

F. Enter a declaratory judgment that in the event that the confinement of the plaintiff is warranted, it must be the least restrictive confinement;

(Footnote continued on following page)

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(Footnote continued from preceding page)

G. Enter a declaratory judgment that if the confinement of the plaintiff is found to be warranted, that an individual treatment plan specifically designed for the plaintiff alone, must be immediately implemented within thirty (30) days;

H. Enter a declaratory judgment that if the confinement of the plaintiff is warranted, that the defendants must provide for adequate medical and psychiatric care, and that the same should include at a minimum, the requirement for a complete physical once every six (6) months;

I. Enter a declaratory judgment that the defendants' failure to provide for sanitary and otherwise minimally humane living conditions, including adequate heat, constitutes a violation of the plaintiff's constitutional rights to be free from cruel and unusual punishment;

J. Enter a declaratory judgment that the failure to allow the plaintiff at hearings to determine his release to produce witnesses on his own behalf, to have the hearing open to the public, and to be furnished with a written decision containing a statement of the reasons for the decision, constitutes a violation of plaintiff's constitutional rights to a meaningful hearing under the due process clause of both the New Jersey State and United States Constitutions;

K. Enter an order preliminarily and permanently enjoining the defendants, their agents, successors, employees, and all other persons acting in concert or participation with them, or at their direction or under their control, from further administering any medication without first obtaining the proper consent in accordance with law;

L. Entering preliminarily and permanently a mandatory injunction to compel the defendants, their agents, successors, employees, and all other persons acting in concert or in participation with them or at their direction or under their

(Footnote continued on preceding page)

Appendix A

(Footnote continued from preceding page)

control, compelling them to provide a sanitary cell, providing heat in the cell which heat should be at a minimum of 68° during the day and at a minimum of 60° during the night, and otherwise provide for minimally humane and safe living conditions;

M. Enter, preliminarily and permanently, a mandatory injunction compelling the defendants, their agents, successors, employees, and all other persons acting in concert or in participation with them, or at their direction or under their control, to provide an individual treatment plan designed specifically for the plaintiff alone within thirty (30) days;

N. Enter, preliminarily and permanently, a mandatory injunction compelling the defendant, their agents, successors, employees, and all other persons acting in concert or participation with them, or at their direction, or under their control, to provide that hearings to determine the release of the plaintiff be opened to the public and that the plaintiff be allowed to present witnesses on his behalf, and that the plaintiff be allowed to receive a written decision which decision shall include a statement of reasons for the decision;

O. Enter, preliminarily and permanently, a mandatory injunction compelling the defendants, their agents, successors, employees, and all other persons acting in concert or participation with them, or at their direction or under their control, to provide a law library for the plaintiff or in the alternative access to an existing law library in order that the plaintiff's access to the courts not be further impeded;

P. Judgment for damages, both compensatory and punitive, for the illegal detainment of the plaintiff, for the failure to provide an individual treatment plan for the plaintiff, for the failure to otherwise provide adequate medical and psychiatric care and treatment for the plaintiff, for the failure to provide minimally humane and safe living conditions, and for the administration of medication without first having obtained the proper consent.

while more concisely and artfully set out, preserve all the claims which we previously considered. The prayers for relief included virtually all modes of relief which it is within the power of the court to grant to the plaintiff. An answer was filed on behalf of all defendants on February 23, 1978. Thereafter on March 13, 1978 the court filed a memorandum and order granting leave to file an amended complaint. The memorandum and order refer to a prior order directing that an amended complaint be filed, and to an order vacating the order, neither of which appear of record. The memorandum also refers to another Scott complaint, No. 78-2367, in which he seeks habeas corpus relief, and directs that it be consolidated with the five cases we had previously consolidated. An order to that effect was entered on October 3, 1978, and the defendants' answer to the complaint in No. 78-2367 was filed seven days later. On October 18, 1978, thirty months after our mandate was received by the district court, a status conference was held. There is no record of what transpired at this conference. Nothing more transpired about scheduling the cases for trial until February 15, 1979, when the district judge to whom it was assigned sent a memorandum to Mr. Weintraub, and to the District Court clerk, but not to the Attorney General who was representing the defendants, asking to be advised "as to necessary time for final trial prepration so date can be set." Meanwhile Scott sent to this court and to other places a number of letters asking for disposition of his case. Finally, on April 23, 1979 an order was entered by the Chief Judge of the District Court reassigning the case to himself and reallocating the place of trial from Newark to Trenton. Chief Judge Fisher promptly scheduled a trial date and issued a writ of habeas corpus ad testificandum for Scott's ap-

pearance. The trial commenced on May 31, 1979, 37 months after the date our mandate reached the district court, and 58 months after Scott first sought relief in the district court.

III.

At the trial Scott testified and also presented the testimony of Dr. Robert Sadoff, a psychiatrist, and 58 exhibits. The exhibts were for the most part excerpts from the records about his condition and treatment maintained by Trenton Psychiatric Hospital during the course of his stay. Others dealt with the physical condition of the Vroom Building. Still others were written complaints by Scott and by his mother to various state officials, including defendants, respecting his treatment and the conditions he was being subjected to.

At the end of the plaintiff's case the court, on motion by the Attorney General, dismissed the State of New Jersey as a defendant, ruling that it was not a "person" subject to suit under 42 U.S.C. § 1983. The court also dismissed as defendants Governor Brendan T. Byrne, on the grounds that there was no evidence he either participated in or knew of and allowed continuance of any wrong to Scott, and the Chief Justice and members of the Supreme Court of New Jersey, because "I can't tell the Supreme Court to enforce their rules. . . ." (Transcript, June 6, 1979, at 44). Motions to dismiss were rejected as to the remaining defendants, Dr. Ingre R. Plante and Dr. Martin Weinberg, who each held the positions of Chief Executive Officer and Medical Director of Trenton Psychiatric Hospital, and Ann Klein, State Commissioner of the Department of Institutions and Agencies,

of which Trenton Psychiatric Hospital is a part.[5] The court also dismissed all of Scott's state law claims, which included false imprisonment, assault and battery, and malpractice. Neither the transcript nor the court's post-trial opinion discloses whether the state law claims were dismissed for failure of proof or as a matter of discretion with respect to the exercise of pendent jurisdiction. The effect of these rulings was to dismiss the State, the Governor, and the Supreme Court of New Jersey not only on the damage claims which were going to the jury, but also on any claims for injunctive or declaratory relief on either state or federal grounds. Dismissal of the pendent state law claims also withdrew from the case any possibility of an award of money damages or injunctive or declaratory relief on those claims.

The defendants' case included the testimony of Harvey Musikoff, Acting Chief Executive Officer of Trenton Psychiatric Hospital, who was from October 1977 to April 1978 Chief of the Forensic Section of that hospital, contained in the Vroom Building. Dr. Musikoff holds a Ph. D. in rehabilitation counseling and has taught forensic psychology. While he was on the stand five packets of hospital records, Exhibits D-1 through D-4 and Exhibit D-8, were marked in evidence, comprising all records relating to Scott for his entire stay in Vroom. The defendants also introduced Exhibit D-5, a group of documents dealing with requests to the Governor and the Legislature for additional funding for the Vroom Building over the past four or five years. Finally Exhibits D-6 and D-7 included various New Jersey State court orders dealing with Scott's

[5] The Attorney General represented all defendants. No cross-claims were filed.

confinement. The defendants presented no medical testimony. None of the three defendants left in the case testified. Instead, at the close of Dr. Musikoff's testimony they renewed their motion to dismiss the complaint. The court denied that motion.

IV.

Only the claims for money damages were submitted to the jury. Those were submitted in the form of special verdict interrogatories to which the defendants made no objection. The interrogatories and the jury's answers are as follows:

1. Was the plaintiff deprived of adequate treatment while at Trenton State Hospital Forensic Unit? Yes
2. If the answer to No. 1 is "yes", was that deprivation the proximate cause of injury and damage to plaintiff? Yes
3. Was plaintiff forced to undergo harmful or painful modes of treatment over his refusal? No
4. If the answer to No. 3 is "yes", was it the proximate cause of injury and damage to plaintiff?
5. Were the physical conditions at the Vroom Building such as to amount to a deprivation of due process? Yes
6. If the answer to No. 5 is "yes", was it the proximate cause of injury and damage to plaintiff? Yes
7. Do you find liability as to any of the following defendants? Yes

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	Ingre R. Plante, M.D.	Yes
	Ann Klein	Yes
	Martin Weinberg, M.D.	Yes
8.	Compensatory Damages	$15,000.
	Punitive Damages	$10,000.

Thus the case was, with the defendants' apparent acquiescence, submitted on three separate theories, against three separate defendants, but with a request for a single verdict on compensatory damages and a single verdict on punitive damages. It appears, therefore, that the jury found the defendants jointly and severally liable for compensatory and punitive damages. The special verdict interrogatories predicate liability on deprivation of adequate treatment and on deprivation of due process with respect to the conditions of incarceration in the Vroom Building, but do not separate the damages among the two bases of recovery. Since the defendants did not in the trial court object to the form of the interrogatories either before or after the verdict, and do not on appeal argue that they were prejudiced by the way the questions were formulated, we must read them in a manner which reconciles them with the jurors' probable intention in light of the Court's instructions. *Cf. Atlantic & Gulf Stevedores, Inc .* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962); *Bernhart* v. *Dollar Rent A Car Systems, Inc.*, 595 F.2d 914, 917 (3d Cir. 1979) (resolution of facially inconsistent answers to special interrogatories).

> In its instruction to the jury the court observed that the plaintiff breaks his claims against defendant[s] down to three categories: First, the right to treat-

> ment, secondly, the right to refuse treatment and thirdly, that the conditions of the Vroom Building, that is as you have heard them, were a violation of his Constitutional rights to due process.

The jury's verdict was adverse to Scott on the alleged violation of a right to refuse treatment, and he does not on appeal raise any question about that verdict. Thus we are concerned only with his right to receive treatment and his condition of confinement claims.

> On the right to treatment claim the Court charged: Now, while the plaintiff was confined to Trenton State Hospital, Forensic Unit thereof, which you have heard so much about, he had a right to adequate medical treatment. This right arose from the 14th Amendment of the United States Constitution which provides no State shall deprive any person of life, liberty or property without due process of law. Plaintiff was committed because he was dangerous to himself and to others. That is in the first instance. Remember, he has never been convicted of a crime. In exchange for his commitment which society was entitled to, the State owed plaintiff adequate medical treatment. You, the jury, must decide whether plaintiff received the treatment which was owed.

Although the defendants contended in the trial court, and contend here, that an involuntarily committed patient has no federally protected right to treatment, they made no objection to the quoted portion of the charge; in particular, they made no request for a more specific definition of adequate treatment, and made no objection to the language "he had a right to adequate medical treatment." In *Romeo*

v. *Youngberg*, No. 78-1982, (3d Cir. Nov. 25, 1980) (en banc) we held that the involuntarily committed mentally retarded have a constitutionally protected right to treatment, and the analysis of that case is for fourteenth amendment purposes equally applicable to the involuntarily committed mentally ill. *Id.*, slip op. at 32 n.53. Thus we have rejected the defendants' basic position that there is no federally protected right to treatment. The quoted portion of the charge is less complete with respect to such a right than the one which in *Romeo* v. *Youngberg*, *supra*, we held to be appropriate,[6] but no more specific charge was requested and no objection was made. The charge informed the jury, correctly, that Scott, as a patient involuntarily

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[6] Proposed jury instructions were set forth in an appendix to *Romeo:*

> A. If you find that the plaintiff was involuntarily committed for treatment, and no treatment was administered, and no compelling explanation for the lack of treatment was offered, you may hold the defendants liable.
>
> B. If you find that the plaintiff has received some treatment, you must then determine whether the treatment is regarded as acceptable in light of present medical or other scientific knowledge. If you find that it is not acceptable, you may find for the plaintiff. In addition, if the evidence does not demonstrate that there is a relationship between the treatment administered and the plaintiff's needs, even if the treatment is arguably regarded as acceptable in other situations, then you may find for the plaintiff. In deciding upon the adequacy of the treatment program adopted you may consider the defendants' explanations regarding security concerns, administrative necessities and fiscal constraints.

Slip op. at 42.

commited for mental illness, had a right to treatment, and the verdict reflects the jury's conclusion that he was deprived of that right.

As to the conditions of confinement, the Court charged:

> Now . . . [Scott] also contends that the conditions at the Vroom building amounted to punishment without due process of law and violation of the Civil Rights Act.
>
> You have heard evidence which described the conditions of the Vroom building in which plaintiff has been confined for 24 years. You must remember that at no time was plaintiff convicted of a crime. Therefore, I Charge you that the State could not Constitutionally punish him. You must determine whether the conditions existing in the Vroom building amounted to punishment.
>
> Not every disability or loss of liberty which plaintiff has experienced is punishment. You must remember that the State originally saw fit to confine him because he was deemed to be dangerous but unable to stand trial. Loss of some freedom of choice and privacy are inherent in confinement and do not rise to the level of punishment, and the fact that detention interfered with the plaintiff's desire to live as comfortably as possible and with as little restraint as possible did not mean that he was being punished. A number of factors should guide your decision of whether plaintiff was being punished.
>
> Were the conditions and disabilities of Vroom imposed by officials for the purpose of punishment?

> If not, then is the condition which you are considering reasonably related to a legitimate government objective, or is it arbitrary or purposeless? Besides the State's objective of keeping a dangerous individual off the streets, you should realize that the government has a legitimate interest that stem [sic] from it's [sic] need to manage the facility in which plaintiff was detained. These governmental interests include the maintenance of security and order at the institution. Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, amount to punishment. However, if the conditions or restraints are excessive in relation to the State's non-punitive purpose, you may find they constituted punishment.

This charge gives meaning to the jury's answer to interrogatory No. 5. That affirmative answer establishes that the jury concluded that Scott, who has not been convicted of a crime, has been confined in the extremely harsh restrictive conditions of the Vroom Building for reasons not related to legitimate government objectives, i.e., as punishment. Defendants did not object to this portion of the trial instructons, and none of their requests to charge are inconsistent with it.

Having charged the jury that Scott had a right to treatment and a right to be free from punishment the court turned to the issue of personal responsibility. In that respect the Court charged:

> If you decide that plaintiff was given adequate treatment, you need decide no more. But if you find his treatment was inadequate, you must next determine whether either Ann Klein, Dr. Ingre Rudolph

Plante, or Dr. Martin Weinberg were responsible for the denial of treatment.

Since Ann Klein was not involved with the day-to-day running of the institution, you obviously won't be able to find that she actually participated or acquiesced in any denial of treatment. She can only be liable if you find that she had actual knowledge of the Vroom building's inadequate treatment of the plaintiff, while having the power to authorize or implement better care for him. You could find this knowledge, not only by direct evidence, but also by proof, that defendant Klein normally exercised reasonably close supervision over the defendants personally charged with the plaintiff's care and that those defendant's [sic] acts or omissions were open and not surreptitious.

With respect to Doctors Plante and Weinberg, you could apply the same test in determining whether they had actual knowledge to [sic] the inadequacies of plaintiff's treatment and also, had the resources in [sic] authority to remedy the situation.

Plante and/or Weinberg might also be liable for their actual participation in a denial of plaintiff's rights by denying him a right to treatment. You must decide whether either of those two doctors actually was engaged in a course of conduct calculated to deny plaintiff his right to treatment.

The defendants did not object to this portion of the charge. They did, however, request a charge on vicarious liability, and urge as error the Court's failure to give

it.[7] The charge as given, however, is substantially as requested and accords with the standard for personal liability in § 1983 actions set forth in *Hampton* v. *Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3d Cir. 1976). The charge on personal responsibility deals specifically only with failure to treat Scott. Defendants made no objection, however, to the court's failure to relate that portion of its instruction to the unlawful punishment claim, and made no request for a charge addressed to that issue.

Finally the Court turned to the issue of official immunity, charging:

> Now, the defendants in this case are All State Executive Branch officials. They claim that they are immune from having to respond in money damages to plaintiff's claim. This claim of immunity is offered as a defense to plaintiff's claim and the officials have the burden of convincing you by a preponderance of the evidence that immunity should attach.
>
> There are two components to the immunity defense. Keep in mind also, that plaintiff has a number of claims which you must keep distinct for purposes of applying the defense.
>
> If you find that plaintiff was subjected to punishment without due process, you must decide which

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[7] The charge requested is:

> "It is well settled in this circuit that liability based directly upon 42 U.S.C. §1983 cannot be based on a theory of vicarious liability, but instead requires actual participation in the unlawful conduct, or actual knowledge of and acquiescence in that conduct." *Coggins* v. *McQueen*, 447 F. Supp. 960, 966 (E.D. Pa. 1978).

> of the defendants, if any, knew or should have known of plaintiff's right to be free from punishment and if they knew or should have known that their conduct or omission would or did violate the law. The foregoing inquiry is relevant only to the issue of punishment through conditions.
>
> The immunity defense would be unavailable to defendants on all plaintiff's claims, right to treatment, right to refuse treatment and punishment, if you find that any of the defendants acted or failed to act with malicious intention to deprive the plaintiff of a right or to cause him other injury. For the purpose of determining whether any defendant possessed malice, you must decide whether or not he intended the consequences of his conduct or omission.

The charge as given was not objected to. It must, however, be contrasted with several instructions requested by the defendants. Most of them were properly rejected because they were framed in such a manner as to place the burden of offering evidence and of persuasion on the plaintiff. We have held that qualified immunity is a defense on which the defendants have the burden of proof. *Skehan* v. *Bloomsburg State Teachers College*, 590 F.2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979).

One request, however, is worthy of note. The defendants asked for a charge:

> Monetary damages can only be assessed against a defendant if he or she "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [plaintiff], or if he took the action

with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff]. . . .

"For purposes of this question, an official has, of course, no duty to anticipate constitutional developments." *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 (1975).

The defendants contend that the charge as given fails to comply with *O'Connor* v. *Donaldson's* "two-step test for official immunity" (Appellee's Brief 3-D), although their brief does not elaborate. The charge as given provided, with respect to all of plaintiff's claims, that the immunity defense "would be unavailable to the defendants . . . if you find that any of the defendants acted or failed to act with malicous intention to deprive him of a right, or to cause him other injury." The negative implication of the language seems to be that absent malice the defense is available. As to the lesser standard, "that he knew or should have known", the court applied that standard only to the punishment claim. The court's intention seems to have been to require a finding of malice to overcome the immunity defense on the right to treatment claim, while requiring a finding either of malice or of knowing disregard of a known constitutional right with respect to the punishment claim. Such a distinction would be entirely consistent with the position of the defendants, pressed both in the district court and here, that the law with respect to a constitutional right of the involuntarily committed to treatment was highly unsettled. *See Reese* v. *Nelson*, 598 F.2d 822, 826 (3d Cir. 1979). A fair reading of the charge, then, seems to be that it required a finding of qualified immunity on the right to treatment claim unless malice were shown. This was more than the defend-

ants sought in the quoted request to charge, and on this record possibly more than defendants were entitled to. That this may have been their contemporaneous understanding is confirmed by their failure to object when given an opportunity to do so at the close of the court's instructions. If there was ambiguity in the manner in which the court articulated the immunity charge it could not ordinarily be considered now, for "[n]o party may assign as error the giving of the failure to give an instruction unless he objects thereto before the jury retires stating distinctly the matter to which he objects and the grounds of his objection." Fed. R. Civ. P. 51; *see Fisher* v. *Volz*, 496 F.2d 333, 348 (3d Cir. 1974).[8]

V.

Thus the legal standards which the court below used to instruct the jury and assess plaintiff's equitable claims were substantially correct. Resolution of the remaining questions on appeal depends on whether the law was correctly applied to the particular facts of this case.

We turn first to Scott's appeal from the judgment dismissing all requests for injunctive, declaratory, and habeas corpus relief. We believe that in two respects the trial court erred in denying equitable relief.

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[8] Because a new trial on liability and damages is granted on other grounds to be discussed later, the district court will have an opportunity to make its charge on the "good faith" defense more specific so that the nature of the defense will be clearly presented to the jury. *See O'Connor* v. *Donaldson*, 422 U.S. 563, 577 (1975); *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975) and *Procunier* v. *Navarette*, 434 U.S. 555 (1978).

Appendix A

A. *Conditions of Confinement*

The jury found, and the court agreed, that confining Scott in the maximun security wing of Trenton Psychiatric Hospital amounted to punishment in violation of the due process clause. There was ample evidence that Scott and the other inmates were exposed for twenty four years to subhuman living conditions, including poor plumbing with leaking pipes covering the floor with inches of water; inoperative sinks and toilets; inadequate ventilation; absence of windows or inoperative windows; inability during seven months of the year to go into the yard for fresh air; inoperative radiators resulting in indoor temperatures below 50°; summer temperatures reading 105° due to absence of ventilating equipment; for a time availability of showers only once a week; and absence of hot running water in sinks in the cells. As to many of these gross physical deficiencies the testimony was not even disputed. The record discloses no treatment or security reason for subjecting Scott and the other inmates to such severe deprivations. To the contrary, there was evidence in the form of hospital records suggesting that Scott has neither engaged in violent behavior nor been a management problem. Indeed, a 1971 report by a Dr. Folmer of the hospital staff recommends that he be placed in a civil ward because of his cooperative behavior. Nevertheless, he remained through trial (and is to date) confined to a prison wing of the hospital which includes sentenced inmates suffering severe mental illnesses.

In the face of such harsh confinement, Scott petitioned for complete release, or, in the alternative, for transfer from the prison wing to a civil ward. The court

concluded that the relief of complete release from custody was not, in Scott's present condition, appropriate. That finding is not clearly erroneous. At a minimum, however, this record required that the court make findings of fact as to whether Scott could be housed in surroundings less restrictive of his personal liberty. Courts have a duty to guard against unnecessary personal restraints not only at the confinement stage, which can range from maximum to minimum security.[9] As one court has observed, "It makes little sense to guard zealously against the possibility of unwarranted deprivations prior to hospitalization only to abandon the watch once

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[9] Courts have not limited "least restrictive" analysis to a choice between outpatient services and institutionalization. Within this Circuit, the doctrine has been used to make finer distinctions. Thus, in *Eubanks* v. *Clarke*, 434 F.Supp. 1022 (E.D.Pa. 1977), Chief Judge Lord wrote:

> Fundamental rights are implicated where the state civilly commits an incompetent person to a mental hospital which is substantially more restrictive than other state mental hospitals to which one could be sent.
>
> . . .
>
> We hold that at a minimum, where a state has varying available facilities for the mentally ill which differ significantly in the amount of restrictions on the rights and liberties of the patients, due process requires that the state place individuals in the least restrictive setting consistent with legitimate safety, care, and treatment objectives.

434 F. Supp. at 1027-28. *See also Kesselbrenner* v. *Anonymous*, 33 N.Y. 2d 161, 305 N.E. 2d 903, 905 (1973) (transfer of civilly committed patient, believed dangerous, to penal facility for the criminally insane without consideration of less restrictive alternatives held unconstitutional).

the patient disappears behind hospital doors." *Covington* v. *Harris*, 419 F.2d 617, 623-24 (D.C. Cir. 1969). In that case, a plaintiff, whose circumstances closely resembled Scott's,[10] was granted a hearing at which the hospital was required to demonstrate that it had considered alternative security accommodations for appellant and to explain why it had found them inadequate. We find Scott is entitled to the same.[11]

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[10] Covington was charged with murder, but civilly committed after being found incompetent to stand trial. In ten years at the maximum security pavillion he had never been violent or unruly.

[11] There is no justification for treating material differences among intramural dispositions as *de minimis*. Indeed, the Supreme Court has not ignored differences of degree within the context of criminal incarceration. *Cf. Wolff* v. *McDonnell*, 418 U.S. 539, 571-72 n.19 (1974) (prisoner entitled to due process safeguards when officials substantially increase the severity of his confinement). The argument for judicial review in the civil commitment context is even stronger.

Although Scott was initially placed under maximum security, this fact does not relieve the state of any obligation to justify continuing imposition of such severe restrictions. *Cf. Donaldson* v. *O'Connor*, 422 U.S. 563, 574-75 (1975): "Nor is it enough that [the inmate's] original confinement was founded upon a constitutionally adequate basis, . . . because even if his involutary commitment was initially permissible, it could not constitutionally continue after that basis no longer existed." Since Scott filed his amended complaint in 1978, the State of New Jersey has itself, recognized that the condition of civilly committed patients is subject to possible change and thus now utilizes mandatory periodic review procedures in state courts to tailor restraints to changed circumstances. *See* New Jersey Court Rules 4:74-7(f) (1980);

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Precedent in this Circuit supports this conclusion. In *Romeo* v. *Youngberg, supra,* we held:

> The basis of Romeo's first claim, that he was unduly shackled, is clearly inimical to the right of an unconvicted citizen to be free from punishment. Shackling may not be punishment per se, but it raises a presumption of a punitive sanction. It squarely collides with a traditional liberty interest in freedom from bodily restraint. A valid involuntary commitment *ex necessitate* extinguishes a retired person's right to freedom from any type of confinement. Nevertheless, a residuum of liberty remains which is entitled to due process protection.

Slip. op. at 13-14. After *Romeo* shackling may be justified only by a "compelling necessity" or by showing that it was "the least restrictive method of dealing with the patient in light of his problems and the surrounding environment." Slip op. at 16. That holding applies, as well,

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State v. *Fields*, 77 N.J. 282, 390 A.2d 574 (1978). When the state fails in a *Fields* hearing to justify continuance of the status quo, the judge "mold[s]" a new order providing for "the least restrictive restraints" found "consistent with the well-being of the community and the individual." 390 A.2d at 584. The record shows no such hearing being held in Scott's case and the trial court made no findings as to the reasons why, if any. The analogy to state law does not stay the hand of this court to remedy denial of Scott's federally-protected constitutional rights, but it does suggest that our holding today need not inevitably flood the federal courts with petitions for relief.

to Scott.[12] Although Scott was not shackled, the severe restrictions on movement and deprivations of sanitary,

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[12] The fact that Scott is mentally ill and possibly dangerous, rather than retarded, as Romeo was, affects only the nature and weight of the state's justifications for its restraints. *Romeo* left no doubt, however, that all civilly committed patients, both dangerous and non-dangerous, were entitled to have the conditions of their confinement subjected to strict scrutiny. Both enjoy the right of unconvicted citizens to be free from punishment. Both enjoy a right to treatment, and thus to the extent severe physical deprivations and restraints are contra therapeutic, such measures conflict with one of the original rationales for confinement.

Although some patients may be so dangerous that only maximum confinement can adequately protect the safety of others, courts should not conclude that all patients committed on grounds of dangerousness must be so confined permanently. Our understanding of mentally ill persons believed dangerous remains sadly limited; but at least one research study suggests that states may have been employing unnecessarily restrictive forms of confinement for them. The results were reported in Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1107, 1136-37 (1972):

> [Baxtrom v. Herold, 383 U.S. 107 (1966)] had the effect of forcing the state of New York to transfer 992 patients from Matteawan, an especially secure hospital for the criminally insane, to regular mental hospitals elsewhere in the State. Researchers followed all 992 patients for a year. They found that all but seven of the 992 had fared well enough in less secure, often unlocked facilities that the new hospitals had not seen a need to seek their return to more secure facilities. Indeed, 147 were discharged to the community, far more than would have been released from Matteawan in an average year, and those who remained in reg-

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healthful conditions experienced by inmates in the Vroom Building qualitatively resemble shackling, and so likewise raise "a presumption of a punitive sanction." Our decision in *Romeo* acknowledged as much[13] and indicated that the judicial restraint perhaps appropriate to consideration of inadequate treatment claims should not apply when courts are asked to judge alternative environmental dispositions within the institution. Slip op. at 14 n.24 & 32 n.55. Although the assignment of a patient to the maximum security wing of a hospital may involve the exercise of medical prognosis, just as the choice of treatment does, the court has a greater obligation to re-

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ular hospitals seemed indistinguishable to the staffs from the general hospital population. The study may provide little firm indication of how the same men would have fared if never hospitalized at all or if placed initially in a minimum security hospital, but it should increase courts' skepticism both about claims that a person is dangerous and about claims that hospitalization is necessary. [citations omitted].

[13] We made clear in *Romeo* that our holding extended beyond the use of locks and chains. Deference to administrative and fiscal constraints must give way, we indicated whenever a claimed post-commitment abridgment "reach[es] the status of a gross deprivation or squarely cut[s] across constitutionally protected interests. . . ." Slip op. at 12. Obviously not all unpleasant conditions of confinement, some of which are inherent in large-scale institutions, constitute "gross deprivations." Although no doubt the line between punishment and discomfort is not always a bright one, nonetheless we are convinced that severe restrictions on intramural mobility or unsanitary, climatically extreme conditions which endanger health amount to punishment and cannot be ignored by courts.

view constraints involuntarily imposed than it does treatments a state offers to willing patients. *Cf.* slip op. at 25 (limits placed on state's power to impose drastic treatments without patient's consent). Moreover, whereas courts may lack the resources or inclination to evaluate day-to-day therapeutic prescriptions, they are well suited to examine a discrete long-term state action such as the fact and conditions of Scott's confinement in the Vroom Building. *Cf. Halderman* v. *Pennhurst State School & Hospital*, 612 F.2d 84, 102 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3797 (1980) (Nos. 79-1404/1408/1414/1415/1489) (Congressional mandate to courts to enforce least restrictive standards for personal liberty under Developmentally Disabled Assistance and Bill of Rights Act). Any reservations over applying least restrictive analysis to the conditions of temporary detainment[14] must yield when the deprivation of liberty can last as long as 24 years or more.

Scott was therefore entitled to have the court below carefully consider his petition for transfer from the maximum-security pavillion to a civil psychiatric wing of the hospital. Before denying the request, the court must be satisfied that hospital officials have considered the existing alternative residences and found that no less restrictive setting would be sufficient to secure adequate protection from threatened harm.[15] The district court's opinion below

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[14] *Cf.* Bell v. Wolfish, 441 U.S. 520 (1979) (pretrial detainees, 85% of whom were released within 60 days).

[15] Far from being justified by an overriding state interest, excessive physical restraints would conflict with the state's interest as proclaimed in N.J.S.A. § 30:4-24.2(e)(2), which entitles mental patients, civilly committed because dangerous, "to the least restrictive conditions necessary to achieve the purposes of treatment."

contains no findings that the subhuman conditions at the Vroom Building were necessary to the state's legitimate interest in protection,[16] or that Scott's placement in other, less restrictive surroundings available at Trenton Psychiatric Hospital was ever tried or considered and found unworkable. To the contrary, there are strong indications in the record that he could be moved to a civil ward where his liberty would be less restrained and his surroundings would be more comfortable.[17]

The fashioning of an appropriate decree respecting Scott's future custody is a matter which should be addressed by the trial court in the first instance. But even if it is determined that no place but the Vroom Building is secure enough to house Scott, specific relief from its intolerable physical conditions should be ordered. They are not justified by a "compelling necessity" related to the purposes of confinement. Instead, they are at best the result of insufficient funding, which *Romeo* held was not an adequate excuse. Slip op. at 16.[18]

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[16] Defendants' principal defense at trial for the disgraceful living conditions at the Vroom Building was budgetary constraint. With regard to bodily restraints, *Romeo* expressly indicated that "except in emergency situations, inadequate resources or administrative rationales offer an insufficient basis for intrusions of this kind on a fundamental liberty interest." Slip op. at 16.

[17] In addition to Dr. Folmer's report, noted earlier, there was even testimony that such transfer was offered to Scott as an inducement for him to drop this suit.

[18] Although defendants' lone witness, Dr. Musikoff, testified that some physical improvements had recently been accomplished and that

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Appendix A

B. *Adequate Treatment*

The jury also found, and the court agreed, that Scott has been unconstitutionally denied treatment. Scott's own testimony, that of his expert, Dr. Sadoff, and the hospital records reveal that no staff member worked with plaintiff individually on a regular basis; that neither a psychiatrist nor a psychologist has seen him individually on any regular basis in the twenty four years of his confinement; that ten years after his confinement a staff physician filed a report that there was no reason to bother trying to treat him; that recently a treatment team was established, but it met with him for only ten to fifteen minutes a month;[19] and finally, that he had not received any psychiatric counseling for almost a year and a half

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several more were planned, nonetheless the budget requests submitted by defendant Klein and introduced as exhibits indicate that such promises provide inadequate assurance. For example, a new forensic facility was proposed, but eventually deleted from 1978 bond issue legislation. Even a $500,000 budget request for "emergency repairs" to the Vroom Building was only listed 12th in priority in the Hospital's capital budget request for FY 1980. As for Scott's placement in a cleaner, improved cell beginning December, 1978, we note that his testimony reveals several transfers from one cell to another over the past several years. In light of these considerations—budgetary restraints and the apparent frequency of cell transfers—we believe Scott is entitled to the protection of a specific injunction.

[19] The jury may have been unimpressed with such testimony in light of testimony by plaintiff's expert witness that "suitable" treatment requires one and preferably two or three such sessions per week.

prior to trial. Indeed, it is undisputed that Trenton Psychiatric Hospital lost its hospital accreditation several years ago partly because the treatment offered its inmates was merely custodial and not therapeutic.

> The court denied prospective relief, however, noting:
>
> Although he must be accorded all possible consideration and treatment, plaintiff's medical future cannot be directed through this court, but must depend upon the determination of experts as to his individual requirements and needs. I am satisfied from the information provided at the motion hearing in September that definitive steps have been taken and will continue in order to rectify any deficiencies in that regard.

Memorandum at 10. This is not a satisfactory disposition of Scott's claim for injunctive relief with respect to lack of treatment. It is of course the case that his medical future must depend upon medical judgment as to his individual requirements and needs. *Halderman* v. *Pennhurst State School & Hospital*, 612 F.2d 84, 114 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3797 (1980) (Nos. 79-1404/1408/1414/1415/1489). But he has been substantially without the benefit of such medical assistance for 24 years, he has been in court seeking it since 1973, and even today the State's brief contends that he is not constitutionally entitled to it. The court refers to definitive steps already taken, but there is nothing of record disclosing what those steps are or what assurance there is that they will continue. Scott contends, and we agree, that he is entitled to the protection of a specific injunction.

Scott also contends (1) that the trial court erred in denying his habeas corpus petition to be released complete-

ly from custody; (2) that the court erred in denying relief respecting a law library in the Vroom building. The court's findings of fact on these claims are not clearly erroneous and denial of relief with respect to them was a permissible exercise of discretion. Finally, Scott contends that the court erred in entering judgment in favor of Governor Brendan T. Byrne and the Justices of the New Jersey Supreme Court. There is no evidentiary basis for any damage claim against these defendants, and they do not appear to be necessary parties for the equitable relief we have held should be considered.

VI.

In response to special interrogatories, the jury returned verdicts in favor of Scott as to both the treatment and punishment claims, on the basis of which they awarded both compensatory and punitive damages. Defendants Plante, Klein and Weinberg filed a motion for judgment notwithstanding the verdict or alternatively for a new trial. We must depend on the trial court's recital of the grounds for this motion for it is among the docketed pleadings which in the certified record are "missing." The court treated the motions separately and in considering the motion for judgment notwithstanding the verdict dealt separately with the claims for punitive and for compensatory damages.

A.

Despite the motion for judgment notwithstanding the verdict, the compensatory award was upheld on several grounds. First, the court denied the motion as to the verdict on the treatment claim. Appealing from that denial,

defendants urge that as a matter of law a person confined because he is a danger to self or others has no constitutional right to any treatment. That contention lacks merit. Had Scott been at large he might have been in a position to seek the treatment which would alleviate his mental illness. As we have held in *Romeo* v. *Youngberg, supra,* the state may not both deprive him of the liberty to seek treatment and of the treatment as well.

> The right to treatment or habilitation in the case of the mentally retarded—arises when an individual is involuntarily committed, regardless of whether *parents patriae* or police power grounds provide the major premise for the confinement.

Romeo v. *Youngberg, supra,* slip op. at 25; *accord, Eckerhart* v. *Hensley,* 475 F.Supp. 908, 915 (W.D. Mo. 1979).

The defendants also contend that as a matter of law they were entitled to judgment notwithstanding the verdict by virtue of the eleventh amendment, since they were acting in official capacities as state officers. That contention is frivolous. *Ex Parte Young,* 209 U.S. 123 (1908); *Osborn* v. *Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824).

Defendants also urge that they should have been granted judgment notwithstanding the verdict because there is no evidentiary basis for the verdict that they personally violated Scott's rights. In that respect we must examine separately the treatment claim and the punishment claim.

In discussing the propriety of injunctive relief in Part V, we reviewed the evidence indicating that Scott's right to treatment had been violated. In addition to the testimony and hospital records, from which the jury could

have found an absence of adequate treatment, there was the opinion of Dr. Sadoff that Scott's chances of improvement were probably diminished by the lack of treatment in the early stages of his institutionalization. Even the one witness presented by the defendants, Dr. Musikoff, conceded that earlier treatment might have led to improvement. Moreover, there was evidence from which the jury could have found that the individual defendants were personally responsible for the lack of treatment or aware of it and in a position to remedy that lack. Such knowledge could be inferred from the fact that the inadequacies of treatment which eventually resulted in loss of accreditation in 1977 must have been apparent long before that time to these defendants. Also, the jury could find that in addition to receiving complaints from Scott, Commissioner Klein and Dr. Weinberg made occasional on-site inspections of the Vroom Building. Dr. Weinberg even sat in on group treatment sessions which Scott attended and was quoted in his affidavit as saying that he was familiar with Scott's treatment in his role as plaintiff's custodian.

On the basis of this record, the trial court was thus correct to conclude that a judgment notwitstanding the verdict for lack of evidentiary support on the treatment claim would be improper. Although the jury was told to consider the case against each defendant separately, no provision was made for a discrete assessment of damages against each based upon their individual acts. Once again, since the point was not raised by the defendants, it must be deemed to have been waived.

As to the punishment claim, there was likewise ample evidence—reviewed in Part V—that the subhuman living conditions at the maximum security prison wing to which Scott has been confined amounted to punishment.

Appendix A

As noted with respect to the discussion of the treatment claim, the jury could find that the defendants knew of his complaints, of the availability of alternative environments, and of their own power to arrange for them. The jury could have found that there was no treatment or security reason for subjecting Scott to such severe deprivations, in which event, the trial judge instructed the jury they were to find the defendants liable. Therefore, the evidence was sufficient to support the jury's finding that Scott's confinement was unconstitutional under the lenient rationality standard charged by the trial judge, let alone under the "compelling necessity" standard we adopted in *Romeo* v. *Youngberg, supra.*

Finally, defendants also contend that their motion for judgment notwithstanding the verdict should have been granted because they were entitled to a directed verdict that they were covered by official immunity. The trial court, rejecting that contention, observed:

> The good faith immunity argued by defendants is qualified in nature and not absolute in a § 1983 action. The charge properly placed the burden of persuasion for this defense upon the defendants . . . and it was fully within the province of the jury to reject it as they did in making a compensatory award.

Memomorandum at 4. We agree. In reviewing a motion for judgment notwithstanding the verdict, we must determine, without weighing the credibility of the evidence, and giving Scott, who secured the jury verdict, the benefit of all reasonable inferences that can be drawn from that evidence, whether reasonable minds could not come to a different conclusion. *See Fireman's Fund Ins. Co.* v. *Videfreeze Corp.*, 540 F. 2d 1271, 1177-80 (3d Cir. 1976), and cases

cited. The right to have facts found by a jury, guaranteed by the Seventh Amendment, applies no less to civil rights actions than to conventional tort cases.

Reviewing the record in light of the foregoing strict standard, we cannot say the jury was compelled to find that defendants had established their requisite good faith. First, we note that the violations for which they were found liable are not acts of negligence. Punitive conditions or the absence of any treatment become constitutional violations because the justifications put forward by the state are not compelling.[20] The substance of the violation does not necessarily indicate the individual defendants' state of mind at the time the acts occurred or the reasonableness of their legal position, which, together, are the focus of inquiry for official immunity purposes. Pertinent to that inquiry was testimony from which the jury could have inferred that defendants withheld treatment, despite recognition that institutionalization without such treatment tends to deepen a patient's mental incapacity. Under such circumstances the jury might conclude that the defendants knowingly caused injury to Scott and, therefore, could not in good faith have believed they were acting within the law. Indeed, there was evidence that the defendants acted in disregard of the New Jersey law governing their institution and entitling its patients to adequate treatment and habitation.[21] It was harder still for official immunity to overcome the punishment claim, given that the right of

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[20] *See* Instructions I and III-A in the appendix to *Romeo* v. *Youngberg*, *supra*, slip op. at 41-42.

[21] *See* N.J.S.A. §30:4-24.2; *State* v. *Carter*, 64 N.J. 382, 316 A.2d 449 (1974); *State in Interest of RGW*, 145 N.J. Super. 167, 366 A.2d 1375 (J & D. R. Ct. 1976).

citizens—even in institutions—to be free from inhumane conditions has long been undisputed. *See Scott* v. *Plante*, 532 F.2d 939 (3d Cir. 1976).

If defendants' position is that they innocently misconceived the law or had found it unsettled, they should have supplied evidence to that effect at trial. The risk of nonpersuasion with regard to the qualified immunity defense is placed squarely on the defendants. *Skehan* v. *Bloomsburg State Teachers College, supra.* Yet none of the named defendants in this case even appeared to testify. The testimony of Dr. Musikoff does not touch on the beliefs of the defendants in the reasonablness of their respective courses of conduct, or on their knowledge of the governing legal standard. Indeed, the record contains no evidence suggesting that the right to treatment or to be free from punishment was in their mind unsettled. Dr. Musikoff's evidence touches only slightly on the tardy efforts, if any, defendants took to improve Scott's treatment or the conditions of his confinement beginning in 1977. Evidence of budgetary appeals by defendants in recent years to improve treatment and conditions at Vroom Building was certainly admissible, but evidence of their good faith with regard to the institutional population as a whole does not resolve as a matter of law the issue of their good faith towards the individual plaintiff in this case, whose specific plight the jury could have found was utterly ignored. On this record the jury certainly could conclude, as it obviously did, that defendants failed to carry their burden of proof on the good faith immunity defense.

B.

The trial court granted the defendants' motion for judgment notwithstanding the verdict on the claim for puni-

tive damages. Scott appeals from that order. As in the previous discussion of such motions on the liability claims, we must avoid weighing the credibility of the evidence and must give Scott, who secured the jury verdict, the benefit of any reasonable inference that can be drawn from that evidence. The standard is the same as that for the grant of a directed verdict, and in reviewing the record we owe no particular deference to the trial court's determination, but must make our own. *See Fireman's Fund Ins. Co.* v. *Videfreeze Corp., supra,* 540 at 1177-80.

In addition, we must be mindful of the legal standards governing the award of punitive damages in § 1983 actions. The award of punitive damages is authorized by that aspect of the law of torts having to do with admonition rather than compensation. Such an award punishes wrongdoing beyond the requirements of compensation both as a discouragement of private retribution and as a deterrent against future misconduct. The admonitory standard requires that the factfinder determine that the defendants "acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so. . . ." *Cochetti* v. *Desmond,* 572 F.2d 102, 106 (3d Cir. 1978). Moreover,

> . . . although punitive damages are not a favorite of the law and are to be allowed only within narrow limits,
>
> > [t]he allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are

of necessity within the discretion of the trier of fact.

Fisher v. *Volz*, 496 F.2d 333, 347 (3d Cir. 1974), *quoting Lee* v. *Southern Home Sites Corporation*, 429 F.2d 290, 294 (5th Cir. 1970).

Mindful of these principles, we nonetheless confess to uneasiness about imposing exemplary damages against these defendants based on the existing record. We note, for example, Commissioner Klein's efforts—albeit unsuccessful—to get money from the legislature for upgrading the Vroom Building. In light of these efforts, we believe an inference of malice or wantonness must be based on more than her specific awareness of Scott's plight derived from two letters, both of which she forwarded to appropriate subordinates. This is not to say that the record conclusively vindicates the Commissioner's role in this case. When the evidence is simply too sparse to determine the punitive damages issue one way or another, and plaintiff bears the burden of proving malice or wantonness, *Cochetti* v. *Desmond, supra*,[22] perhaps a jury award of punitive damages cannot stand.

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[22] Plaintiff cannot be heard to complain that our rejection of defendants' immunity defense necessarily implies sufficient bad faith has been shown to support punitive damages. The defense of official immunity depends on defendants establishing good faith, and we concluded in Part VI-A that they failed to carry this burden. With respect to punitive damages, however, it is the plaintiff who bears the risk of non-persuasion on the issue of malice or recklessness. We, therefore, find nothing inherently inconsistent about upholding the judgment of liability for violation of constitutional rights, while expressing doubts about the award of punitive damages.

However, the insufficiency of the evidence on this issue warrants close examination, since the circumstances of this case are somewhat unusual. We traced earlier in Part II, the sluggish treatment of plaintiff's case which eventually required reassignment of the case to Newark from Trenton and prompted quick assignment of a trial date. This unorthodox course of events may explain why no pretrial conference was held, far enough in advance of trial to assist the parties in preparing their case. Realizing for the first time at trial the importance of demonstrating Commissioner Klein's personal responsibility and obtaining subjective evidence, plaintiff's counsel at that time served a subpoena on the Commissioner in order to obtain her testimony. Despite plaintiff's protestations, the trial court quashed the subpoena. That ruling no doubt hampered plaintiff's ability to carry his burden of proof on the issue of punitive damages.

We need not decide then whether the lower court's direction of judgment notwithstanding the verdict was valid on the existing record. Even when such a motion is granted, if the insufficiency of evidence is attributable to trial error, the defendants are not entitled to judgment notwithstanding the verdict and the appellate court can order a new trial. *See Derr* v. *Safeway Stores,* 404 F.2d 634 (10th Cir. 1968); 9 Wright & Miller, Federal Practice & Procedure §2540 at 614 (1971); Fed. R. Civ. P. 50(c)(2), Notes of Advisory Committee at 200. We note, too that the Federal Rules permit a trial judge to order a new trial *sua sponte* within ten days of granting a judgment n.o.v., if he believes it is necessary to ensure substantial justice to the verdict-winner. Fed. R. Civ. P. 59(d). An appellate court should likewise be able to exercise such discretion, especially where as here

there existed an alternative motion for a new trial, on which the lower court did not rule, despite the direction in Fed. R. Civ. P. 50(c)(1) to do so.

We conclude then that the issue of punitive damages in this case can only be properly resolved by a new trial, thereby affording plaintiff a more meaningful opportunity to prepare his case against Klein and the other individual defendants through interrogatories or depositions. The court of appeals has broad discretion to grant a new trial as to all or some issues. *Heckman* v. *Federal Press Co.*, 587 F.2d 612, 619 (3d Cir. 1978). In that case, we emphasized the general rule stated by the Supreme Court:

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.

Gasoline Products Co. v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931). We are not convinced that complete separation of the damage and liability considerations in this case is possible; therefore we conclude that the better course would be to have all plaintiff's claims for legal relief submitted to the jury on retrial.

VII.

Advancing an alternative motion for a new trial under Fed. R. Civ. P. 59, the defendants urged in the trial court that the liability verdict should be set aside because the verdicts were against the weight of the evi-

dence. The trial court rejected both contentions. In light of our foregoing conclusion that a new trial is necessary on all legal claims, we need not review those decisions.

On damages, however, acting on defendants' new trial motion, the court took an action which was beyond its powers; lest the error recur on remand, we take this opportunity to address it. Concluding that the compensatory damage award of $15,000 exceeded the amount that a jury could properly award, the trial court reduced the award to one dollar. The court did so without affording the plaintiff the option of accepting a remittitur or a new trial. In a case where the facts as to damage are in dispute, the court may not do this without violating the Seventh Amendment. *Kennon* v. *Gilmer,* 131 U.S. 22 (1889); 6A Moore's Federal Practice ¶59.05[3] at 59-61 (2d ed. 1979). This is not a case, such as *Garfield Aniline Works* v. *Zendle,* 43 F.2d 537, 538 (3d Cir. 1930), in which the amount of damage is a matter of undisputed calculation. Thus the court's decision to set aside the verdict and enter judgment for one dollar cannot stand.

Moreover, we have serious questions about the court's view of the evidence of damage. The court's charge properly instructed the jury that Scott could in a Section 1983 action recover for "any pain, suffering and mental anguish already suffered by him and proximately resulting from the injury in question." If the jury concluded, as apparently it did, that Scott had been confined unnecessarily in the harsh conditions of the Vroom Building, it certainly could infer that he suffered pain and mental anguish. *See, e.g., Buse* v. *Hudkins,* 584 F.2d 223 (7th Cir. 1978), *cert. denied,* 440 U.S. 916 (1979) (prisoner entitled to more than nominal damages in view of less desir-

able living conditions at prison than at farm); *Mack* v. *Johnson*, 430 F. Supp. 1139 (E.D.Pa. 1977), *aff'd* 582 F.2d 1275 (3d Cir. 1978) (prisoner confined in segregation cell for 30 days compensative for deprivation of exercise and presumed mental anguish); *Wright* v. *McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970) *aff'd in relevant part*, 460 F.2d 126 (2d Cir. 1972) ($1500 award to compensate prisoner for being confined nude in isolation). Where the fact of injury appears but damages are not susceptible of mathematical calculation, the court should not ordinarily disturb the jury's evaluation of an appropriate compensatory award. *Chuy* v. *Phila. Eagles Football Club*, 595 F.2d 1265, 1279 n. 19 (3d Cir. 1979).

We do note, however, that the court was requested by defendants to charge that Scott not be compensated for damages due to lack of treatment for periods during which he refused a particular form of treatment. See *Donaldson* v. *O'Connor*, 422 U.S. 563, 569 n.4 (1975). Although this failure to charge might not, alone, have warranted a new trial, the court will have an opportunity to consider this request more carefully on remand. Moreover, the court was requested to charge that damages could be awarded only for the period within the statute of limitations. The failure to give such a charge permitted the jury to assess damages from the time the plaintiff was first confined in 1954. We find no express ruling on this request and since it was not briefed, we do not pass on its merits. *See generally Rosenau* v. *City of New Brunswick*, 51 N.J. 130, 238 A.2d 169 (1968); *Stanley Development Co.* v. *Millburn Tp.*, 26 N.J. Super. 328, 97 A.2d 743 (1954); *cf. Stuebig* v. *Hammel*, 446 F. Supp. 31 (M.D. Pa. 1977) (Pennsylvania law).

Appendix A

VIII.

One remaining issue, not raised in Scott's brief, must, because of our disposition of this appeal, be adverted to. At the end of the plaintiff's case the court dismissed the State of New Jersey as a defendant. At that time the court did not have the benefit of the Supreme Court's opinions in *Maine* v. *Thiboutot,* 48 U.S.L.W. 4859 (U.S. June 25, 1980) and *Maher* v. *Gagne,* 48 U.S.L.W. 4891 (U.S. June 25, 1980). In remanding the case, however, we note the likelihood, if not the certainty, that Scott will apply for an award of attorney's fees pursuant to 42 U.S.C. § 1988, thus directly implicating *Maher.* To avoid prolonging this protracted litigation any more than necessary, we believe it appropriate to point out, in light of the recent Supreme Court rulings and the facts of this case, that the State's presence as a defendant for purposes of awarding such counsel fees may be important. The judgment is not yet final. On remand, therefore, the court below may upon proper motion by the plaintiff reconsider its judgment dismissing the State as a party and determine whether it is an appropriate defendant against which an award of attorney's fees might be made insofar as prospective injunctive relief is to be granted against the individual defendants in their official capacity.

IX.

The judgment in defendants' favor on Scott's claims for prospective relief will be vacated and the case remanded for consideration of specific equitable relief in light of Scott's right to be given adequate treatment and have his assignment to other less restrictive settings

within Trenton Psychiatric Hospital carefully considered. With respect to the liability of the individual defendants for compensatory and punitive damages, the judgments below are vacated and the case remanded with direction to grant a new trial on these issues in light of this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Opinion of the United States District Court for the District of New Jersey

(Original Filed—January 8, 1980)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALLEN BODINE SCOTT,

Plaintiff,

v.

DR. INGRE RUDOLPH PLANTE, *et al.*,

Defendants.

Civil Action No. 1052-73

HON CLARKSON S. FISHER

Defendants move alternatively for judgment n.o.v. or new trial following a jury verdict against them in the amount of $15,000 compensatory and $10,000 punitive damages. Plaintiff, who had been involuntarily confined to the Forensic Unit of Trenton Psychiatric Hospital (Vroom Building) for 24 years at the time of trial, sought relief pursuant to 42 U.S.C. §1983 for alleged deprivation of his constitutional rights to medical and psychiatric treatment and to

humane living conditions. Plaintiff had been placed in the facility in 1955 upon determination that he was mentally incompetent to stand trial on an indictment charging murder of his grandmother. In 1968 the court found plaintiff insane both at the time of the crime and on the hearing date and continued his commitment. Again in 1975 the court determined plaintiff still insane and dangerous to others. Medication was administered without plaintiff's consent between 1973 and 1974. During the balance of his years in the Vroom Building he has refused medication.

Prior to jury deliberations plaintiff's state law claims were dismissed and the complaint was dismissed as to all defendants except: Inge Rudolph Plante, M.D., individually and in her official capacity as Chief Executive Officers of Trenton Psychiatric Hospital; Anne Klein, individually and in her official capacity as Commissioner of the Department of Institutions and Agencies; and Martin Weinberg, M.D., individually and in his official capacities as Medical Director of Trenton Psychiatric Hospital and as New Jersey Mental Health Commissioner.

Specific interrogatories provided to the jury were answered as follows:

> In-Court Deputy: Question No. 1, was the plaintiff deprived of adequate treatment while at Trenton Forensic Unit?
>
> The Foreman: Yes.
>
> In-Court Deputy: Was that deprivation approximate [sic] cause of injury and damage to the plaintiff?
>
> The Foreman: Yes.
>
> In-Court Deputy: Was the plaintiff forced to undergo harmful or painful modes of treatment over his refusal?

The Foreman: No.

In-Court Deputy: Were the physical conditions at the Vroom Building such as to amount to a deprivation of due process?

The Foreman: Yes.

In-Court Deputy: Was it the proximate cause of injury and damage to the plaintiff?

The Foreman: Yes.

In-Court Deputy: Do you find liability as to any of the defendants?

The Foreman: Yes.

In-Court Deputy: All three?

The Foreman: Yes.

Transcript of Verdict, June 13, 1979, p. 2-15—p. 3-13.

JURY VERDICT

Judgment n.o.v.

Defendants contend that the jury verdict against them for monetary damages must be vacated as a matter of law because (1) in their individual capacities none of them was involved either directly or indirectly in any violation of plaintiff's constitutional rights, and (2) in their official capacities the 11th Amendment bars such recovery. They further argue that the weight of the evidence does not support the monetary award.

The standard for granting judgment n.o.v. is rigid and analogous to that for a motion for directed verdict. The Third Circuit has held that such relief "may not be granted unless as a matter of law it is found that [plaintiff] failed to present a case for the jury, and a verdict in [defend-

ant's] favor should have been directed at the end of the trial." *Neville Chemical Co.* v. *Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir.) *cert. denied*, 400 U.S. 826 (1970). The court must determine, after viewing the evidence and all reasonable inferences most favorably to the non-moving party, "that there is not sufficient evidence upon which the jury could properly have found for the non-moving party." *Rogers* v. *Exxon Research and Engineering Company*, 404 F. Supp. 324, 336 (D.N.J. 1975), *vacated and remanded on other grounds*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *see* 9 Wright & Miller, *Federal Practice and Procedure* §2524.

Defendants' "weight of the evidence" claim is inappropriate to a motion for judgment n.o.v. where it is the duty of the judge "to accept the plaintiff's version as true for the purposes of the motion, notwithstanding the existence of strong testimony to the contrary; the judge is not concerned with the weight of the evidence. . . ." *Fireman's Fund Ins. Co.* v. *Aalco Wrecking Co., Inc.*, 466 F. 2d 179, 186 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973), quoting *Simpson* v. *Skelly Oil Co.* 371 F.2d 563, 566-567 (8th Cir. 1967).

The jury clearly made a determination, as evidenced by the answers to interrogatories, that the named defendants shared responsibility for deprivation of plaintiff's constitutional rights to medical treatment and to due process by reason of living conditions within the Vroom Building. The interrogatories did not require separate assessment of each right, and it is therefore impossible at this point to reconstruct the jury's analysis.

Nevertheless, based upon the charges given and the evidence adduced, there was a sufficient factual basis for

a jury finding that plaintiff is entitled to some compensatory award. In addition to the long line of cases establishing the constitutional right of an involuntarily confined mental patient to proper treatment, New Jersey statutes place an affirmative obligation upon the state to provide "services in accordance with accepted standards" (N.J.S.A. 30:4-24.1; *see State* v. *Carter,* 64 N.J. 382 (1974)) and case law has rejected the argument that failure to provide suitable and adequate treatment is justified by lack of staff or facilities. *State in Interest of R.G.W.,* 145 N.J. Super. 167 (J.&D.R. Ct. Pass 1976). Based upon the exhibits and testimony it was not improper for the jury to determine the named defendants knew or should have known that minimal standards were lacking. The efforts of the defendants to acquire funding for improvement of the physical conditions and treatment methods does not excuse liability in an action based directly on §1983 on the basis of vicarious liability or 11th Amendment where there is actual knowledge of the alleged conditions. *See, Coggins* v. *McQueen,* 447 F. Supp. 960 (E.D. Pa. 1978). The good faith immunity argued by defendants is qualified in nature and not absolute in a §1983 action. The charge properly placed the burden of persuasion for this defense upon defendants (Transcript of Summation and Charge, p. 40-41) and it was fully within the province of the jury to reject it as they did in making a compensatory award.

However, an award of punitive damages in the instant case is totally without evidentiary basis. It is well established that

> . . . Punitive damages should not be awarded in a §1983 proceeding unless there is a showing that the prescribed action has been a constant pattern or

> practice of behaviour of defendants and that such practice has been willful and in gross disregard for the rights of plaintiff . . .

Urbano v. *McCorkle*, 334 F. Supp. 161, 170 (D.N.J. 1971).

After a complete review of the record I find that my instructions were disregarded by the jury on the issue of punitive damages so as to constitute a "mistake or clear abuse of its fact-finding discretion." *Tann* v. *Service Distributors Inc.*, 56 F.R.D. 593, 598 (E.D. Pa. 1972), *aff'd.* 481 F.2d 1399 (3d. Cir. 1973). Although I admonished the jury that any such award must be made "with calm discretion and sound reasons and must never be either awarded or fixed in amount because of any sympathy or bias or prejudice with respect to any party in the case," (Transcript of Summation and Charge, p. 46-1, 4), there is no evidence that the defendants acted with "impermissible motivation or . . . disregard" of plaintiff's constitutional rights to such an extent that they should be subjected to a judgment for punitive damages. *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975).

Consequently, it is clear that a directed verdict in favor of defendants was in order with respect to an award of punitive damages. Accordingly, defendants' motion for judgment n.o.v. is granted on the issue of punitive damages only, and that portion of the jury verdict is vacated.

New Trial

The alternative motion for a new trial pursuant to Fed. R. Civ. P. 59 is "addressed to the sound discretion of the district court." *Grove* v. *Dun & Bradstreet, Inc.*, 438 F.2d 433, 438 (3d Cir. 1971). Guidance is again pro-

vided by *Fireman's Fund* citing *Simpson, supra,* providing for a less stringent test, wider but not unlimited latitude, and consideration to arguments involving weight of evidence and injustice to defendants. Defendants assert both of these contentions and append charges of erroneous instructions as another basis for new trial.

I will not address in detail each and every point raised by defendants' brief. The Third Circuit has cautioned, however, that:

> . . . [W]here no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and, to the extent that new trials are granted, the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. . . .

Lind v. *Schenley Industries, Inc.,* 278 F.2d 79, 90 (3d Cir.) [en banc], *cert. denied,* 364 U.S. 835 (1969).

This standard was enlarged upon in *Gebhardt* v. *Wilson Freight Forwarding Co.,* 348 F.2d 129, 133 (3d Cir. 1965) where the court observed that:

> If the evidence in the record, viewed from the standpoint of the successful party, is sufficient to support the jury verdict, a new trial is not warranted merely because the jury could have reached a different result. [citations omitted.] Neither the

> trial court nor this court may substitute its judgment for that of the jury on disputed issues of fact. . . .

From the record and my observations during the trial, I cannot find that the jury verdict on the issue of liability was so clearly erroneous as to warrant a new trial or that the instructions taken as a whole were prejudicial to defendants. Accordingly, defendants' motion for a new trial is denied.

Compensatory Damages

Defendants argue that good faith immunity should cloak them from all liability in damages to plaintiff except for a nominal sum of $1. I have agreed that the record establishes no malice sufficient to sustain the punitive damage award. However, a thorough review of the transcripts and my own recollection of the testimony and demeanor of the witnesses lead me to conclude that the charges to the jury and the interrogatories propounded and answered do not fairly apprise defendants as to the monetary allocation made by the jury on the two areas of constitutional deprivation. Here, two separate causes of action exist, both predicated upon §1983. The United States Supreme Court has declared that the purpose of a §1983 damage award "is to protect persons from injuries caused by deprivation of constitutional rights" applying the tort principle of compensation for breach of duty. *Carey* v. *Piphus*, 435 U.S. 247, 254-55 (1978). To link §1983 damages to tort law requires plaintiff to present a *prima facie* case establishing the requisite elements of duty, breach, causation and damages.

Normally, I would be adverse to disturbing the verdict of the jury and usurping in any way its role as fact-finder. Here, however, although the amount of the award *per se* is not shocking to the conscience, it is my view that it represented frustration on the part of the jury and an attempt to assess blame for plaintiff's problems upon whomever was before it in the status of a defendant. I am particularly concerned that the record reveals no real "injury" to plaintiff that is compensable by the state under the factual circumstances existing in this case. This is not analogous to *Donaldson* where a non-dangerous, non-criminal patient was involuntarily confined in violation of his constitutional right to liberty. *Donaldson* v. *O'Connor*, 493 F.2d 507 (5th Cir. 1974); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). There was and is genuine public interest in maintaining plaintiff within a controlled environment. Such action has served to stabilize his mental condition. In integrating the facts and the law which governs the grant of monetary damages to aggrieved plaintiffs, there is no justification either with regard to lack of medical treatment or living conditions for choosing these or any other defendants to be liable for money damages.

Although there is considerable disagreement between the parties as to when an actual "right to treatment" was first recognized as constitutional in nature, and questions of whether remittitur is proper during plaintiff's refusal of treatment or to limit recovery by application of a two-year tort statute of limitations, those arguments are not addressed. It is clear that when no injury exists, no compensation can be awarded, and "injuries caused by deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Carey* at 259.

Accordingly, the jury award of $15,000 compensatory damages is reduced to nominal damages of $1.

EQUITABLE ISSUES

The balance of the issues raised by plaintiff's complaint are not triable to a jury and must now be disposed of by me based upon the entire record.

Petition for Habeas Corpus

Based upon the jury finding, plaintiff claims that his involuntary confinement in violation of constitutional rights warrants his immediate release and return to society.

While I concur with plaintiff that he is entitled to relief if his actual *custody* violates the Constitution, such is not at issue. *Rose* v. *Hodges,* 423 U.S. 19 (1975). Additionally, the Third Circuit in *Souder* v. *McGuire,* 516 F. 2d 820 (3d Cir. 1975) has held only that an involuntary commitment may be challenged by way of *habeas corpus* and permission should be granted for the petitioner to proceed *in forma pauperis.* Relief is not automatic.

The records of plaintiff reveal that numerous hearings have been conducted with regard to his ability to function outside the hospital environment. All have resulted in negative decisions. Psychiatrists and doctors have consistently stated in testimony and in reports that although plaintiff is stable in his present status, his condition is "chronic'. The fact that he has been dangerous to others in the past has caused the hearing courts to decline granting plaintiff even a conditional release. Prior criminal

conduct is the most critical input in predicting future dangerous conduct. *State* v. *Krol*, 68 N.J. 236, 261 N.12 (1975). Extreme caution must be exercised in the "delicate balance between society's interest in protection from harmful conduct and the individual's interest . . . (and) doubts must be resolved in favor of protecting the public . . ." *Krol* at 261.

There is no question but that the state is now on notice as a result of the decision in favor of plaintiff that more adequate treatment and conditions are required in order to fulfill its statutory obligation. At this time, however, there is no testimony to justify releasing plaintiff from confinement on the grounds asserted in his *habeas corpus* petition absent the high degree of medical prognosis present in *U.S. ex rel. von Woldersdorf* v. *Johnston*, 317 F. Supp. 66 (S.D. N.Y. 1970). *See also Donaldson* v. *O'Connor, supra.*

Plaintiff's petition for *habeas corpus* is denied.

Injunctive Relief

Plaintiff seeks the following alternative injunctive relief compelling defendants:

1. To erect a new facility or repair and renovate the existing structure;

2. To provide an adequate treatment program for plaintiff;

3. To establish a law library within the Vroom Building;

and compelling the New Jersey Supreme Court:

4. To amend its rules to provide periodic full due process hearings and establish proof beyond a reasonable doubt as the institutions burden.

This court does not feel that the circumstances and facts in this case warrant its interference with either the legislative or judicial branch of the government of the State of New Jersey to compel by injunction any of the relief sought by plaintiff. There is no question that courts have both the power and duty to issue specific implementation orders to responsible agencies who fail to implement programs for a mental patient's treatment. *State in Interest of R.G.W.*, 145 N.J. Super. 167 (J&DR, Pass. 1976); see, *e.g.*, *Morgan* v. *Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Williams* v. *Edwards*, 547 F.2d 1206 (4th Cir. 1977). I do not feel that such drastic measures are called for.

Neither can this court dictate to the state rule-making body, absent failure of minimal due process. New Jersey has enacted statutes consistent with federal standards for the protection of plaintiff and those in similar situations. This is not a class action where general injunctive measures might be appropriate.

Although he must be accorded all possible consideration and treatment, plaintiff's medical future cannot be directed through this court, but must depend upon the determination of experts as to his individual requirements and needs. I am satisfied from the information provided at the motion hearing in September that definitive steps have been taken and will continue in order to rectify any deficiencies in that regard.

In addition, the law library facilities at the Vroom Building are undergoing expansion, and book loan arrangements have been made with the State Prison. It is apparent from a complete review of plaintiff's record that he has never been denied access to the courts or lacked legal representation by reason of law library inadequacies in the past.

Accordingly, plaintiff's demands for injunctive relief are denied.

SUMMARY

The jury verdict of liability in favor of plaintiff and against defendants is sustained. The punitive damage award is vacated on defendant's motion for judgment notwithstanding the verdict. The compensatory damage award is reduced to the nominal sum of $1. Plaintiff's petition for *habeas corpus* and for alternative forms of injunctive relief are denied. Defendant will submit an order within 10 days.

Dated: January 7, 1980.

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1314/5 and 80-1596

ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

v.

DR. INGRE RUDOLPH PLANTE, *et al.*,

Allen B. Scott, Appellant in Nos. 80-1314/1596
Dr. Ingre Rudolph Plante, et al, Appellants in No. 80-1315

SUR PETITION FOR REHEARING

Present: ALDISERT, ADAMS, GIBBONS, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellants, Dr. Ingre Rudolph Plante, et al in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other avail-

able circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams, Garth and Higginbotham would grant the petition for Rehearing.

By the Court,

John J. Gibbons
Judge

Dated: March 6, 1981

Statement by Judge Adams Sur the Denial of the Petition for Rehearing En Banc, in which Judges Garth and Higginbotham join.

Whether the standards developed in *Romeo* v. *Youngberg,* No. 78-1982 (3d Cir. Nov. 25, 1980) (en banc) for the involuntarily committed mentally retarded should be applied across-the-board to the involuntarily committed mentally ill who have been incarcerated following a finding of not guilty by reason of insanity, as well as what the exact contours of official immunity and the "good faith" defense should be in this context are important questions which I believe merit the attention of the full court.

APPENDIX D

Order of the United States Court of Appeals for the Third Circuit Staying Issuance of Certified Judgment in Lieu of Formal Mandate Until April 12, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1314/15 and 80-1596

ALLEN BODINE SCOTT, etc.,

vs.

DR. INGRE RUDOLPH PLANTE, *et al.*,

Allen B. Scott, Appellant in Nos. 80-1314 and 80-1596

Dr. Ingre Rudolph Plante, et al., Appellants in 80-1315

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until April 12, 1981.

JOHN J. GIBBONS
Circuit Judge

Dated: March 16, 1981

NO. 80-1699

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DR. INGRE RUDOLPH PLANTE; Commissioner of Institutions and Agencies, ANN KLEIN; Medical Director of New Jersey State Hospital, New Jersey Mental Health Commissioner, DR.MARTIN WEINBERG; STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor; SUPREME COURT OF NEW JERSEY, RICHARD J. HUGHES, Chief Justice,

Petitioners,

vs.

ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 80-1699

IN THE

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DR. INGRE RUDOLPH PLANTE; Commissioner of Institutions and Agencies, ANN KLEIN; Medical Director of New Jersey State Hospital, New Jersey Mental Health Commissioner, DR.MARTIN WEINBERG; STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor; SUPREME COURT OF NEW JERSEY, RICHARD J. HUGHES, Chief Justice,

Petitioners,

vs.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Counter-Statement of the Case

Allen Scott has been confined in the Forensic Unit of Trenton Psychiatric Hospital since 1955. Although he has had several hearings concerning his mental condition his most recent hearing held on June 11, 1980 and July 2, 1980 is presently on appeal to the Appellate Division of the Superior Court of New Jersey, which appeal alleges error in the ruling of the lower court which held that since Allen Scott was found to be psychotic he must therefore be dangerous.[1]

In this case, plaintiff seeks monetary, declaratory, injunctive, and habeas corpus relief against various State administrative officials for unconstitutional conditions[2] and inadequate psychiatric and medical treatment during his period of confinement as well as his release from confinement for the failure to provide him with the aforesaid.

Although respondent acknowledges the statement of his own expert, Dr. Sadoff, as set forth on page 4 of the brief in support of this Petition, Dr. Sadoff further testified that based upon the absence of any violent or dangerous conduct by Allen Scott since 1955 it was not possible to state he presented an imminent danger of harm to himself,

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[1] The basis for this appeal is grounded upon testimony at the hearing that merely because one's psychotic does not automatically mean one's also dangerous and the fact that since Allen Scott's confinement in 1955 he has not once committed an overt act of violence of any nature whatsoever.

[2] Interestingly, the Petitioner does not set forth the award of damages or the injunctive relief ordered on this claim as an issue to be presented in this Petition for a Writ of Certiorari, nor does Petitioner offer any suggestions as to how this Court can attempt to separate the award between this issue and the right to treatment issue.

others, or to property (IITS, 13-16; T17, 1-24; T24, 20-24),[3] which is the test employed by New Jersey laws to justify his continued commitment.[4]

Dr. Musikoff, defendant's expert witness also admitted that one suffering with Allen Scott's diagnosis does not always have to be dangerous (IIIT113, 15-16).

Although Petitioner has accurately referred to trial testimony on page 5 of their brief such references neglect to set forth Dr. Sadoff's clarification that if their had been no corrective treament or individualized treatment plan that such would constitute harm in a medical sense (II27, 7-12), and although Dr. Sadoff said Scott's situation was typical of persons in a state institution for the criminally insane he said it was unfortunately so (IIT22, 17-22), but that typical did not mean medically effective (II26, 2-6).

Dr. Musikoff, the defendant's own expert witness even admitted that treatment was not adequate to ensure the optimum chance for a cure or improvement in Allen Scott's condition (IIIT119, 18-24).

Although Dr. Sadoff testified as indicated on page 5 of Petitioners' brief that Allen Scott had refused some medi-

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[3] The six transcripts for the five days of trial will be identified as follows:

I May 31, 1979
II June 1, 1979
III June 6, 1979
IV June 7, 1979
V June 13, 1979 (summations and charge to jury)
IV June 13, 1979 (verdict of jury)

Thus, for example, IT112-20 refers to the transcript for May 13, 1979, at page 112, line 20.

[4] *State* v. *Krol*, 68 N.J. 263, 344 A.2d 289 (1975).

cation he clearly stated that the type of treatment Allen Scott needed to even improve, much less be cured of his condition, included psychotherapy, group psychotherapy on a weekly basis, environmental and reality therapy on a daily basis, and occupational or educational therapy on a daily basis (HT10, 13-22; T14, 1-19, 21-25; T15, 5-10).

Regarding Allen Scott's purported refusal of available treatment can not be viewed properly without considering what such treatment actually consisted of. Initially, no one at the institution ever worked with Allen Scott on a regular basis (T74, 19) and neither a psychiatrist nor a psychologist ever saw him on a regular basis since his institutionalization over two decades ago (T76, 13-19). Although a treatment team had been recently established, the evidence at trial revealed that this team only met with Allen Scott once a month and then only for ten to fifteen minutes, which meeting was not even for purposes of providing counseling (HHT122, 5-18; T124, 20-23). Even after Allen Scott had been confined for ten years one doctor stated that since he has been ill for the last ten years there is no reason to even bother trying to treat him (HHT18, 13-16), notwithstanding the fact that expert testimony showed that the optimum chance for success in curing or improving mental illness is in the early period of institutionalization (HT12, 5-12; HHT117, 9-17; T119, 18-24; HT15, 21-25). In fact, no psychiatrist had even had a counseling session with Allen Scott for almost one and one half years before trial (HHT126, 8-11) which was and is antitherapeutic (HT19, 8-17).

Since this Petition has not raised as an issue to be presented the jury award or Court approval of the finding that the conditions of confinement were unconstitutional there is no need to set forth the lengthly list of those conditions. Suffice it to say that the jury found such condi-

tions violated the constitution (Appendix B, page 53a of Petitioner's brief).

After retiring to deliberate the foregoing evidence as to the conditions and lack of treatment the jury returned an award in favor of Allen Scott in the amount of $15,000.00 in compensatory damages and $10,000.00 in punitive damages.

Although upon consideration of the post-trial motions referred to at page 6 of Petitioners' brief, the District Court vacated the award of punitive damages and reduced the compensatory damage award to $1.00, the Court nevertheless found that:

> ". . . based upon the charges given and the evidence adduced, there was a sufficient factual basis for a jury finding that plaintiff is entitled to some compensatory award." (Appendix B, page 53a of Petitioner's brief),

and the Court further observed such a right to treatment was affirmatively imposed upon the State of New Jersey pursuant to its own statutes[5] and that the lack of staff or facilities are not satisfactory arguments for the denial thereof[6] (Appendix B, page 53a of Petitioner's brief).

The remainder of Petitioners' statement of the case as to procedurally how this case moved from the trial Court to this Court is correct.

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[5] N.J.S.A.30:4-24.1.

[6] The District Court cited the New Jersey cases of *State* v. *Carter*, 64 N.J. 382, 316 A.2d 449 (1974) and *State in Interest of R.G.W.*, 145 N.J. Super. 167, 366 A.2d 1375 (1976).

Reasons for Not Granting the Writ

The most significant reason why this Writ need not and should not be granted lies in the fact that the decision below regarding a right to treatment in the least restrictive setting was based in part, and could stand alone as the sole justification for the decision below, on the very statutes of the State of New Jersey. The Court below acknowledged that N.J.S.A.30:4-24.2(e)(2) entitled a mental patient to be committed to the least restrictive conditions necessary to achieve the purposes of treatment.

Further, the decision of the Court below can not be fairly said to conflict with the decisions of other Circuits. Nor is it fair to represent that there is no basis in the decisions of this Court considering this Court's decision in *Shelton* v. *Tucker*, 364 U.S. 479 (1960) wherein this Court held that legitimate governmental purposes can not be pursued in such a way as to eliminate substantial personal liberties when the same result can be achieved by more narrow means.

Again, this case is not likely to have an extremely detrimental effect on the operation of public mental health facilities throughout the United States since the facts herein are peculiar to Allen Scott alone (this suit was not brought as a class action).

Contrary to Petitioners' contentions the Court below has not ignored this Court's prior decisions in *O'Connor* v. *Donaldson*, 422 US. 563 (1973), *Wood* v. *Strickland*, 420 U.S. 308 (1975) and *Procunier* v. *Navarette*, 434 U.S. 555 (1978). In *O'Connor* v. *Donaldson*, Supra, this Court at page 577 gives the 5th Circuit direction by stating that pursuant to *Wood* v. *Strickland*, Supra, the relevant question for the jury to determine is whether Superintendent O'Connor knew or reasonably should have known of the facts alleging constitutional violations.

The Court below (Appendix A, page 23a of Petitioner's brief) clearly acknowledges it is following O'Connor and even more clearly the Court below notes that the jury was charged that they could only find liability if they found the defendants below had actual knowledge which could be established by direct knowledge or by indirect knowledge in the sense that these defendants should have reasonably known (Appendix A, page 20a of Petitioner's brief).

There was ample evidence for the jury's finding as noted by the District Court Judge in his opinion (Appendix B, pages 52a, 53a of Petitioner's brief). Both Drs. Weinberg and Plante visited Allen Scott's place of confinement on numerous occasions, some of those visits being for the purpose of attending Allen Scott's treatment team meetings (IT122, 8-17; T121, 22-25; T122, 1-3). Dr. Weinberg even signed an affidavit that he was Allen Scott's custodian and that he was completely aware of the treatment being given to Allen Scott (IIT?1, 18-21). There was also evidence of Commissioner Ann Klein's presence at Allen Scott's place of confinement (IT121, 10-18) and that she was aware of his complaints (IIT26, 18-25; T27, 1-7; T29, 1-24)

As Commissioner, Ann Klein was charged with knowledge pursuant to her statutory duties as set forth in N.J.S.A.30:1-15.1, and even had a statutory right of action against the medical director[8], her own employee, to mandate remedies of any environmental or clinical inadequacies. Nor could any of these defendants be said to be unaware of the loss of accreditation by the Joint Commission on the Accreditation of Hospitals both as a result of the conditions which did not meet minimal stand-

[8] Both Drs. Plante and Weinberg had held this position.

ards as well as for the lack of sufficient treatment (III T133, 21-23; T134, 11-22).

Since it is clear the Court below followed the directions set forth by *O'Connor* v. *Donaldson*, Supra, and *Wood* v. *Strickland*, Supra, and that the jury had ample evidence upon which to still find liability, the actual intent of the defendants' Petition for a Writ of Certiorari becomes apparent, and stated simply and candidly, these defendants' unhappy with the determination of the jury, the fact finders below, now seek to have this Court substitute their own judgment for that of the jury's, which respondent respectfully suggests is totally inappropriate.

The jury was instructed as to the immunity of these officials under a good faith defense (Appendix A, pages 21a and 22a of Petitioner's brief) and the jury rejected this defense because they determined these defendants' either had knowledge or they should have reasonably known. This is all that *Wood* v. *Strickland*, Supra, required. At page 314 of this Court's decision in *Wood* v. *Strickland*, Supra, this Court agreed with the Court of Appeals in that case which found that the District Court in that case had erred in instructing the jury they needed to find specific intent to harm wrongfully and held that it need only be established that in light of all the circumstances the defendant did not act in good faith.

Contrary to Petitioners' brief, the decision below is not likely to cause the State of New Jersey to discharge all of its dangerous mentally ill. This is an exaggeration and an attempt to prevail upon this Petition by attempting to frighten this Court into granting the Petition for a Writ of Certiorari. Further, the Petitioners' citing of *Welsch* v. *Likins*, 550 F.2d 1122 (8th Cir. 1977) as support for this proposition seems inappropriate since the Court therein suggested alternatives to such drastic ac-

tion. Therein, the 8th Circuit was also told of the enormous costs to the State of Minnesota if forced to correct certain deficiencies in the institution involved. Nevertheless that Court referring to the words of Mr. Justice Blackmun, then an 8th Circuit Judge, stated that "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . ."[9] the 8th Circuit stated that the closing of Minnesota's institutions would be an extreme alternative and that a lesser alternative could be the reduction in the number of such institutions or possibly even to reduce the populations of the institutions to a point where they would be adequately staffed and adequate treatment could be furnished.

Clearly, this Court as well as others have held that no policy of judicial restraint shall encompass a failure to recognize and correct valid constitutional claims. *Procunier* v. *Martinez*, 416 U.S. 468 (1974); *Rouse* v. *Cameron*, 373 F. Supp. 451 (D.C. Cir. 1967); *Inmates of Boy's Training School* v. *Affleck*, 364 F. Supp. 1354 (D.R.I. 1977); *State in the Interest of R.G.W.*, supra; and *Davis* v. *Balson*, 461 F. Supp. 842 (N.D. Ohio W.D. 1978).

In *Davis* v. *Balson*, supra, the Court held it clearly within their province to order both an increase in staff and realignment of staff when necessary to address constitutional deprivations.

Perhaps of greater interest is the case of *State in the Interest of R.G.W.*, supra, since as previously discussed the State of New Jersey has by statute provided for a right to treatment in the least restrictive setting.

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[9] *Jackson* v. *Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

The Court herein found that there was an absolute and immediate right and duty to implement the right to treatment and if necessary to even direct an allocation of monies to that end and thus ordered the State of New Jersey to expend the necessary funds to effect the placement and maintenance of the patient even if it meant a private as opposed to a public institution and even if it had to be in another state.

It is important to keep in mind that this case still involves only one individual and certainly does not qualify as one of exceptional public importance. This is all the more true considering that many of the facts of this case are preculiar to Allen Scott. Further, only a very small percentage of the population of this country is confined in public institutions for the mentally dangerous ill and only a small percentage of any state budget is ever appropriated for these institutions as compared to the overall budgets of our fifty states. Thus it can hardly be said this case presents any particularly exceptional or important public issue which would justify this Court in granting this Petition for a Writ of Certiorari.

A. Certiorari need not be granted to resolve the issue of a constitutional right to treatment since Allen Scott had a statutory right to treatment under the statutes of the State of New Jersey.

The statutes of the State of New Jersey, irrespective of the United States Constitution, gave Allen Scott a right to treatment in the least restrictive setting. N.J.S.A. 30:4-24.2,e(2).

Petitioners' refer in their brief that other than *Romeo* v. *Youngberg,* No. 78-1982 (3rd Cir. 1980) the Court be-

low did not cite any other cases in support is suggestive of the non existence of any prior cases supporting such a holding. However, this is not so, for there exists a long line of cases finding the existence of such a right to treatment. *State* v. *Carter*, supra; *State in the Interest of R.G.W.*, supra; *Nelsen* v. *Heyne*, 491 F.2d 352 (7th Cir. 1974); *Newman* v. *State of Alabama*, 503 F.2d 1320 (5th Cir. 1974); *Rouse* v. *Cameron*, supra; *Tribby* v. *Cameron*, 379 F.2d 104 (D.C. Cir. 1967); *U.S. ex rel Von Woldersdorf* v. *Johnston*, 317 F. Supp. 66 (S.D. N.Y. 1970); *Lessard* v. *Schmidt*, 395 F. Supp. 1078 (E.D. Wisc. 1972); *Welsh* v. *Likins*, supra.

Petitioners' make no attempt to represent that these decisions are in conflict with any other decisions or that any other decisions are in conflict with the decision of the Court below.

In fact, the cases cited by Petitioners' as support for their position actually support and are in unison with the decision below.

Petitioners' cite a federal district court case from New York, *Patton* v. *Dumpson*, 425 F. Supp. 621 (S.D.N.Y. 1977) for the proposition that the failure to properly treat one single person does not allege a violation of the constitutional right to treatment. That very statement acknowledges the existence of a constitutional right to treatment. Further, if we read beyond the point heads of the case we see that what that Court held was that the Complaint filed therein should be dismissed for its failure to allege what treatment was denied to the plaintiff. Rather than appeal the dismissal of the Complaint the plaintiff refiled again and since he was retarded he filed his new Complaint under the Rehabilitation Act of 1973. *Patton* v. *Dumpson*, 498 F. Supp. 933 (S.D.N.Y. 1980).

Petitioners' also cite a federal district Court case from Ohio, *Rone* v. *Fireman*, 473 F. Supp. 92 (N.D. Oh. 1979). However even that Court said,

> "Nor is the Court powerless to determine whether adequate treatment is present . . . It can not reasonably be said that the determination of what constitutes minimally adequate treatment is beyond judicial competence." (at page 119).

The Court recognized at page 119 that treatment is required and that the standard of treatment must be defined by the facts.

The Court in *Rone* found that there are certain standards generally advanced by mental health professionals as essential for minimally adequate treatment: (1) a humane and therapeutic environment (which the jury in the case at bar found that Scott did not have the benefit of and as previously referred to the institution lost its accreditation due to its environment); (2) a qualified staff in sufficient numbers (again in Scott the Joint Commission on the Accreditation of Hospitals found this didn't exist either); (3) a individual treatment plan. The Court in *Rone* found that there was a failure to provide minimally adequate treatment and proceeded to order specific reforms.

The Petitioners' further cite from a footnote from yet another federal district Court case from New York, *Woe* v. *Mathews*, 408 S. Supp. 419 (E.D.N.Y. 1976) pointing out the difficulties in these types of cases. Yet many of the cases upon which our Courts are called upon to decide present difficult questions. Even the Court in *Woe* acknowledges that Courts have found there exists a right to a humane and safe living environment and merely said that such issues can't be determined here at this time upon the posture of this case which is here only upon a motion to dismiss.

In sum, notwithstanding Allen Scott's statutory right to treatment under the laws of the State of New Jersey, Petitioners have failed to cite any cases contrary to the decision of the Court below and they have failed to show that the facts upon which the Scott jury relied were so similar to every other individual so confined in these fifty states that the decision below warranted the need for this Court to grant Certiorari because of the purported far reaching effect.

B. Certiorari need not be granted since the Court of Appeals neither misinterpreted nor eliminated the qualified good faith immunity of state officials as established by this Court's decisions. To the contrary, such rulings were followed.

Previously, under the heading "Reasons For Not Granting Certiorari," respondent has already explained that the Court below did not eliminate the qualified good faith immunity of state officials as set forth in *O'Connor* v. *Donaldson*, supra, and *Wood* v. *Strickland*, supra, and in fact, actually found the intent of these decisions were followed as evidenced by the jury instructions given below. Therefore, respondent will attempt to limit his discussion hereunder to the additional contentions Petitioners' set forth under this point of the brief.

Petitioners' contend the Court below refused to accept that the defendants' were entitled to the good faith immunity set forth in *O'Connor* v. *Donaldson*, supra. The weakness of this argument lies in the inference that since defendants' were found liable the good faith immunity of *O'Connor* was not followed. Petitioners' argument fails to recognize that this Court in *O'Connor* never said that this immunity was absolute, but rather stated it was a qualified immunity. The jury in Scott was so charged. The

jury was charged that these defendants', in order to be liable, must have known or reasonably should have known of the deprivation of Scott's rights. The jury determined the defendants' had not shown that they acted in good faith and as previously set forth in this brief there was ample evidence from which the jury could so find. Clearly it can not be said nor do Petitioners' contend that such a determination was not one to be made by the jury or that it was not within the province of the jury.

Petitioners' even argue against the very cases cited in their brief. Clearly, *O'Connor* v. *Donaldson,* supra, and *Wood* v. *Strickland,* supra, stand for the proposition that there can be liability for a supervisory official if the standards of these cases are met. Yet even though Petitioners' cite these cases Petitioners' now state that the law has clearly established such officials may only be liable if personally involved and cite as support the case of *Donaldson* v. *Hovance,* 473 F. Supp. 602 (E.D.Pa. 1979). The citing of this case is yet another glaring example of Petitioners' reaching out for anything they can find. This case involved a suit against a state trooper and his supervisor based upon an excessive use of force used by the trooper in making the arrest. The Court found that since the trooper's supervisor neither orderd the trooper to use excessive force; since the supervisor didn't know the trooper was going to use excessive force; and since there was nothing in the trooper's background to indicate he might use excessive force there was no basis for finding the supervisor knew or reasonably should have known the trooper would use excessive force. The Court clearly indicated however, that had the supervisor known or had there been something in the trooper's record the supervisor could surely be liable.

Respondent is in complete agreement with this reasoning. In the case at bar the jury, as previously referred to

hereinabove, was told they could not find these defendants' liable unless they found that they personally knew or should have known of the deprivation of Allen Scott's rights. And the jury so found and as referred to hereinabove there was ample evidence from which they easily could justify so finding.

The same is the case in the other cites of the Petitioners' *Hampton* v. *Holmesburg Prison Officials*, 546 F.2d 1077 (3rd Cir. 1976) and *Coggins* v. *McQueen*, 447 F. Supp. 960 (E.D.Pa. 1978). Each of these cases clearly establishes that if the evidence shows that state officials knew or reasonably should have known of the deprivation of the plaintiff's rights liability can be found.

Petitioners' contention that there was no basis for the Court below to vacate the ruling of the district court reducing the damages to $1.00 is without merit and seems to infer that without actual physical injuries the sum of $1.00 is all that can be awarded. To so contend flies in the face of and is in conflict with this Court's own decision in *Carey* v. *Piphus*, 435 U.S. 247 (1978) holding that mental and emotional distress caused by a denial of constitutional rights is compensable in 1983 actions. Surely, the fixing of a monetary value for pain, suffering, and mental anguish is a highly subjective decision and is within the province of the jury. *Chuy* v. *Philadelphia Eagles Football Club*, 595 F.2d 1265 (3rd Cir. 1979); *Drayton* v. *Jiffee Chemical Corporation*, 591 F.2d 352 (6th Cir. 1978); *Gregory* v. *South Hills Movers, Inc.*, 477 F. Supp. 484 (N.D.Pa. 1979).

Petitioners' contention that the Eleventh Amendment bars a recovery in this case based on earlier decisions of this Court fails to recognize not only some of the later decisions of this Court but certain decisions directly dealing with discussions of the interplay between the Eleventh and Fourteenth Amendments to the United States Consti-

tution. *Scheuer* v. *Rhodes*, 416 U.S. 233 (1978); *Hutto* v. *Finney*, 98 S. Ct. 2565 (1978); *Fitzpatrick* v. *Bistzek*, 96 S. Ct. 2666 (1976).

This Court stated in *Scheuer* v. *Rhodes*, supra, that the Eleventh Amendment will not shield a state official who deprives an individual of his constitutional rights. The reasoning supporting this determination is sound. Were it not so then 1983 actions would be drained of meaning and the actions of state officials would in effect, be clothed with the character of being supreme and unchangeable edicts which would be capable of overriding all conflicting rights our citizens enjoy, and which conduct would then be unreviewable by the judicial branch of our government thereby having the potential effect of making a state official's fiat the supreme law of the land.

This Court, has also found that the Eleventh Amendment must yield to the superior rights contained within the Fourteenth Amendment. *Hutto* v. *Finney*, supra; *Fitzpatrick* v. *Bistzek*, supra. These cases deal with the relationship between the Eleventh and Fourteenth Amendments, but the case of *Edelman* v. *Jordan*, 415 U.S. 651 (1974), cited by Petitioners' does not address itself to the relationship of these two amendments.

In sum, the Court below has not eliminated the qualified good faith immunity of state officials but rather, has followed the decisions of this Court.

CONCLUSION

For the froegoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should not be granted.

Respectfully submitted,

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ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

Respondent

AMICI CURIAE BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI on Behalf of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington and West Virginia

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CONSENT OF THE PARTIES

Consent of the parties is not required since this brief is presented on behalf of the States or Commonwealths of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington and West Virginia by their respective Attorneys General (hereinafter Amici). See U.S.S. Ct. Rule 36.4.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not yet reported. The opinion of the United States District Court for the District of New Jersey is also unreported. Both opinions are reproduced in the appendix to the petition for a writ of certiorari of Dr. Ingre Rudolph Plante, et al.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement of the Case contained in the petition for writ of certiorari of Dr. Ingre Rudolph Plante, et al.[1]

INTEREST OF AMICI CURIAE

Each amici state has assumed a substantial role in providing care and treatment for the mentally disabled. See generally *Wilson v. Schweiker,* 49 U.S.L.W. 4207 (March 4, 1981). Likewise, the great and growing costs of such services are largely a state burden. Id. at 4211 n.19.[2] Many amici are now or have been defendants in federal litigation seeking to expand and restructure the services provided.[3] Other amici are or will be directly affected by the precedents established.

[1] Amici are not familiar with any of the events on which Scott asserts liability in this action and, thus, express no opinion with respect to his particular situation.

[2] During 1976 the cost of care at state mental hospitals exceeded $3.2 billion. The average daily census was approximately 180,000 persons. More than 600,000 persons received inpatient care at those hospitals during the course of that year. "Mental Health Statistical Note 153, Provisional & Patient Movement and Selective Administrative Data, State and County Mental Hospitals, Inpatient Services by State: United States 1976" (U. S. Department of Health, Education and Welfare, 1979).

[3] See, e.g., *Wyatt v. Ireland,* C.A. No. 3195-N (N.D. Ala.) (formerly *Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974)); *Goodman v. Parwatikar,* No. 76-1113-C-(1) (E.D. Mo.), (prior

These interests have led amici states to urge review in this Court of several decisions of the courts of appeals on the treatment rights of the mentally disabled. States have a substantial interest in obtaining the clearest and earliest possible guidance on these issues in order to effectively plan the delivery of services to the mentally disabled in the future.

Last term, six amici states urged this Court to issue a writ of certiorari to review the decision in *Halderman v. Pennhurst,* 612 F.2d 84 (3d Cir. 1979), *rev'd and rem'd,* 49 U.S.L.W. 4363 (April 20, 1981). There, the Court of Appeals held that the mentally retarded had rights to treatment and to treatment in the least restrictive environment under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.* After certiorari was granted, twelve amici states joined Pennsylvania in seeking reversal on the merits. This Court reversed and remanded.

Earlier this term, thirty-five amici states and American Samoa urged review of the decision in *Romeo v. Youngberg,* No. 78-1982 (3d Cir., filed Nov. 24, 1980). In that decision, the Third Circuit held that the institutionalized mentally retarded had substantive due process rights (1) to receive treatment which is both acceptable in light of present medical or other scientific knowledge

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opinion, 570 F.2d 801 (8th Cir. 1978)); *Horacek v. Thone,* No. Cv-72-L-299 (D. Neb.) (formerly *Horacek v. Exon,* 357 F. Supp. 71 (D. Neb. 1973)); *Willie M. v. Hunt,* No. CC790924 (W.D. N.C.); *Davis v. Hubbard,* No. 73-205 (N.D. Ohio) (formerly *Davis v. Watkins,* 384 F. Supp. 1196 (N.D. Ohio 1974)); *Caruso v. Clarke,* C.A. No. 78-2519 (E.D. Pa.); *Doe v. O'Bannon,* C.A. No. 80-1763 (W.D. Pa.); *Haynes v. West Virginia,* No. 81-5046 (S.D. W. Va.).

and which is the least intrusive treatment available under the circumstances; (2) to be free of restraints, whether for treatment or protection, absent a showing of compelling necessity; and (3) to be protected from harm, however caused, absent a showing of substantial necessity.

Both *Halderman* and *Romeo* concern the treatment rights of the mentally retarded.[4] This case, in contrast, concerns the involuntarily committed mentally ill. This Court has cautioned that "careful attention must be paid to the differences between mentally ill and mentally retarded. . . ." *Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977). Accordingly, the decision in *Halderman* has not resolved and any decision rendered in *Romeo* would not necessarily resolve the equally important issues raised by this case regarding the mentally ill. So that states may have clear guidance on this matter as well, amici respectfully urge that certiorari be granted.

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[4] *Halderman* further concerns a statute generally inapplicable to the mentally ill. See 42 U.S.C. §6001(7) (definition of "developmental disability").

REASONS FOR GRANTING THE WRIT

1. This case presents important and unresolved questions regarding the existence, source and scope of a constitutional right to treatment which warrant review by this Court.

In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), this Court was asked to determine whether an involuntarily committed mental patient had a constitutional right to treatment. This Court declined to address that question, premising its decision instead on "every man's constitutional right to liberty." Id. at 573. This Court concluded:

> [a] state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom with the help of willing and responsible family members or friends.

Id. at 576.

The issue reserved in *O'Connor* has continued to be a focus of litigation with inconsistent results. While many courts have found a right to treatment, few of those courts have agreed on the source and scope of that right.[5] On the other hand, the Fifth Circuit, once its leading proponent, now admits to "considerable doubts about the legal

[5] One commentator has discerned and criticized five separate theories relied on by courts supporting a right to treatment. Speece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1 (1978).

theory of a right to treatment." *Morales v. Turman*, 562 F.2d 993, 996 (5th Cir. 1977).

In *Scott*, the Third Circuit, per Judge Gibbons,[6] found that the involuntarily committed mentally ill have a right to treatment in the setting least restrictive of their personal liberty. In so doing, the lower court relied exclusively on its prior opinion in *Romeo*,[7] adopting in toto the substantive due process anaylsis espoused there. Similarly, the Court relied on *Romeo* in holding that use of other than the least restrictive treatment setting within a facility could be justified only under the "compelling necessity" standard (28a-29a).[8] Finally, the court sanctioned injunctive relief encompassing both Scott's course of treatment and conditions of confinement (24a-35a).

Amici submit that these holdings depart sharply from sound principles established by this Court. The court below has ignored this Court's admonition that courts are ill-

[6] Judge Gibbons also authored the Third Circuit's opinion in *Halderman*.

[7] The court stated as follows:

> In *Romeo* . . . we held that the involuntarily committed mentally retarded have a constitutionally protected right to treatment, and the analysis of that case is for Fourteenth Amendment purposes equally applicable to the involuntarily committed mentally ill.

(16a-17a). References to (a) herein refer to the Appendix filed by Petitioners in this matter.

[8] In *Romeo*, that standard applied to the use of restraints. Here it is extended broadly to evaluate conditions of confinement. While admitting both that "not all unpleasant conditions of confinement . . constitute 'gross deprivations' " and that "the line between punishment and discomfort is not always a bright one" (30a n.13), the court considered itself "well suited" to makes these distinctions. Id. The court relied on its prior opinion in *Halderman* in so holding (31a).

equipped to make clinical judgments in the baffling area of mental illness. *Parham v. J. R.*, 442 U.S. 584, 606-609 (1979). Similarly, it continues to create constitutional torts, again despite this Court's holdings to the contrary. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Paul v. Davis*, 424 U.S. 693 (1976). The "compelling necessity" test adopted collides with this Court's rejection of that standard as to pretrial detainees in *Bell v. Wolfish*, 441 U.S. 520, 532 (1979). Although this Court has recognized that "[i]t is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting", *Halderman*, 49 U.S.L.W. at 4369, the Third Circuit has authorized precisely those inquiries. Finally, this Court has never found that the involuntarily committed have a right to treatment. See *Sanchez v. New Mexico*, 396 U.S. 276 (1970), dismissing for want of substantial federal question, 80 N. Mex. 438, 457 P.2d 370 (1968); *O'Connor, supra*, 422 U.S. at 587-589 (Burger C. J., concurring). See also *Halderman, supra*, 49 U.S.L.W. at 4367 n.12 (questioning whether Congress would have power to impose statutory right to treatment under Section 5 of the Fourteenth Amendment).

For these reasons, amici urge that the decision below be reviewed by this Court.

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2. In sanctioning awards of compensatory and punitive damages against high level state officials, the court below has misapplied principles of damages established by this Court.

Equally alarming to amici is that aspect of the decision below authorizing the award of compensatory and

punitive damages against defendants who, as New Jersey state officials, administer its mental health system. That ruling ignores at least two basic principles of damages established by this Court.

Liability under 42 U.S.C. §1983 hinges on the personal involvement of defendants in the injuries alleged. *Rizzo v. Goode,* 423 U.S. 362 (1976). Liability against supervisory officials, such as herein, may not be predicated on respondeat superior. Id. at 377; *Monell v. Department of Social Services,* 436 U.S. 658 (1978).

None of the defendants in this case were members of the plaintiff's treatment team nor were they responsible for his placement in the forensic unit. Rather, all were high level administrators. As such, they were responsible for the overall operation of New Jersey's mental health program and the effective expenditure of available funds. Significantly, however, it is the legislature, not any defendant, that weighs priorities and determines the amount of funds to be made available. Inevitably, it is the level of funding that determines the extent and quality of services which can be provided. Nonetheless, according to the Third Circuit, defendants in *Scott* and their counterparts in other states could face liability based upon the treatment provided each patient at every facility under their ultimate supervision. That holding conflicts with this Court's holding in *Rizzo v. Goode, supra,* and warrants review and reversal by this Court.

Equally troubling, the Third Circuit simultaneously announced new constitutional standards and sanctioned a damage award for violations of those very standards. That result conflicts squarely with the "good faith" immunity standard repeatedly recognized by this Court.

Procunier v. Navarette, 434 U.S. 555 (1978); *Scheuer v. Rhodes,* 416 U.S. 232 (1974).

State funded services for the disabled are rapidly expanding. Highly qualified administrators are acutely needed to design those programs and monitor their implementation. Public service often involves a financial sacrifice. The threat of broad monetary liability will inevitably discourage talented professionals from accepting these positions—to the detriment of the disabled themselves. Precisely these policy considerations have been recognized by this Court in fashioning immunity rules. *Wood v. Strickland,* 420 U.S. 308, 321 (1975).

Amici submit that the rulings on damages made below are erroneous and warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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MAY 26 1981

No. 80-1699

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

DR. INGRE RUDOLPH PLANTE, *et al.*,
Petitioners,
v.
ALLEN BODINE SCOTT, by and through his Guardian,
MICHAEL J. WEINTRAUB,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE AND MEMORANDUM OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE

Pursuant to Rule 36.1 of the Rules of this Court, the American Psychiatric Association ("APA") submits this motion to file a memorandum as *amicus curiae*. Petitioners have consented to the filing of this brief; * respondent has refused consent.

As noted in "Interest of Amicus Curiae," the APA has participated in numerous cases involving mental

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* A copy of the letter consenting to the filing is being lodged with the Clerk of this Court.

health issues. See *Youngberg* v. *Romeo*, No. 80-1429, cert. granted, May 18, 1981; *Pennhurst State School and Hospital* v. *Halderman*, Nos. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489, decided April 20, 1981; *Parham* v. *J.R.*, 442 U.S. 584 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). These cases have presented troublesome questions regarding the extent of state obligations towards the mentally-ill (*O'Connor; Addington; Parham*) and the mentally-retarded (*Pennhurst; Youngberg*). In its submissions, the APA has sought to assist the Court in developing legal doctrines that promote, rather than hinder, efforts to improve the quality of care and treatment for the mentally-ill and mentally-retarded. This Court recently granted the APA permission to file an *amicus* memorandum in *Youngberg* v. *Romeo*, *supra*.

The decision of the Third Circuit in the present case, like the decision in *Youngberg* v. *Romeo*, authorizes a substantial intrusion by the federal courts into medical decisions. Again, the court has indicated that certain forms of treatment may be permitted only if shown to be the least restrictive form of treatment available, even though they may be the most desirable methods of treatment from a medical standpoint. The court has also said that state officials must determine whether the facility to which a resident is committed is the least restrictive facility available under the circumstances. Like the decision in *Youngberg* v. *Romeo*, the decision below carries the implication that doctors and employees are subject to damages for institutional inadequacies that they cannot correct, a doctrine that could severely limit the ability of state hospitals to attract and retain qualified staff members. The APA believes that it can supply particular insight, not fully provided by the parties, into the practical and medical realities inherent in the care and treatment of the mentally-ill.

The development of constitutional standards for care of the mentally-ill and mentally-retarded involves a complex balancing process in which medical issues necessarily play a prominent role. Psychiatrists have major responsibility in the development of programs for both the mentally-ill and the mentally-retarded, and many psychiatrists are employed at state and local facilities. The APA believes, therefore, that this Court will benefit from its views as well as the views of advocates for the mentally-ill and of state officials.

It is therefore respectfully submitted that this motion to file a memorandum as *amicus curiae* should be granted.

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Constitutional Provision

United States Constitution Amendment XIV	*passim*

IN THE

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OCTOBER TERM, 1980

No. 80-1699

DR. INGRE RUDOLPH PLANTE, *et al.*,
Petitioners,

v.

ALLEN BODINE SCOTT, by and through his Guardian,
MICHAEL J. WEINTRAUB,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MEMORANDUM OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Psychiatric Association ("APA") was founded in 1844 and is the Nation's largest organization of qualified doctors of medicine specializing in psychiatry. Twenty-six thousand of the Nation's approximately 33,000 psychiatrists are members. Psychiatrists bear a major responsibility for evaluating, developing programs for, and caring for the mentally-ill and the mentally-retarded.

The APA has previously participated as *amicus curiae* in numerous cases involving mental health issues. See *Youngberg* v. *Romeo*, No. 80-1429, cert. granted, May 18,

1981; *Pennhurst State School and Hospital* v. *Halderman*, Nos. 79-1404, 79-1408, 79-1414, 79-1415, and 79-1489, decided April 20, 1981; *Parham* v. *J.R.*, 442 U.S. 584 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). The present case involves significant issues regarding care of, and responsibility for, the mentally-ill, including the establishment of constitutional standards for confinement and treatment and the likely imposition of personal liability on individuals unable to correct institutional inadequacies. The APA believes that its clinical experience and insight concerning the mentally-ill can assist the Court in addressing the important issues in this case.

INTRODUCTION AND SUMMARY

This case, like *Youngberg* v. *Romeo*, No. 80-1429, cert. granted, May 18, 1981, presents important issues regarding constitutional standards for the operation of state institutions and individual responsibility for failure to meet those standards. Relying heavily on its decision in *Youngberg* v. *Romeo*, the Third Circuit has held that, in providing care and treatment for a mentally-ill person, "hospital officials [must] have considered the existing alternative residences and found that no less restrictive setting would be sufficient to secure adequate protection from threatened harm." Pet. App. 31a. The court has also held that the constitutional standards adopted in *Romeo* for treatment for the mentally-retarded, apparently including a requirement of the least restrictive treatment available whenever significant deprivations of liberty are involved, are "equally applicable to the involuntarily committed mentally ill." Pet. App. 16a-17a. Finally, the court has made clear that individual state employees can be held personally liable for failure to satisfy the standards, perhaps in punitive as well as compensatory damages, even though the core of the problem is inadequate

funding over which they have no control. Pet. App. 36a-44a.

These issues merit the attention of this Court. As we have previously indicated in our *Romeo* memorandum,[1] the constitutional standard of least restrictive treatment (or least restrictive setting) is too inflexible and perhaps unworkable. Although the APA believes that the Constitution prohibits the states from simply neglecting the physical and medical needs of persons involuntarily committed to their care, the analysis imposed by the Third Circuit requires courts not just to determine whether basic, decent standards of care and treatment are being met, but to make refined judgments about whether a particular form of care and treatment is the least restrictive or most desirable under the circumstances. This approach carries principles of substantive due process too far, putting federal courts in the position of reallocating resources and making professional decisions without any real constitutional basis or limit. We are also concerned about the willingness of the Third Circuit to endorse personal liability for institutional problems. The definition of the constitutional tort itself, or of the good-faith immunity defense, should accommodate the fact that individual state employees by themselves typically cannot change the conditions giving rise to the complaint.

These issues are very similar to the issues presented in *Youngberg* v. *Romeo*, *supra*. In our view, the Court would benefit from considering questions relating to the mentally-ill and the mentally-retarded at the same time. We submit, therefore, that this Court should grant the present petition and consolidate this case with *Youngberg* v. *Romeo*.

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[1] For the convenience of the Court, we are lodging additional copies of our memorandum in *Romeo* with the Clerk.

ARGUMENT

As the Third Circuit recognizes in its opinion, the questions presented in this case are closely aligned with the issues presented in *Youngberg* v. *Romeo*, No. 80-1429, cert. granted, May 18, 1981. We have summarized our views on these issues in the *amicus* memorandum filed in *Youngberg* v. *Romeo*, and we will not repeat them at length here. We add only a few brief remarks pertaining directly to this case.

1. The court below apparently has required states to provide mentally-ill persons involuntarily committed to institutions with care in the least restrictive setting available. Having described the awful conditions at the Vroom facility, the court specifically ordered an inquiry into "whether [respondent] could be housed in surroundings less restrictive of his personal liberty," Pet. App. 26a, noting that "[c]ourts have not limited 'least restrictive' analysis to a choice between outpatient services and institutionalization." Pet. App. 26a n. 9.[2] The court then found an analogy between conditions at Vroom, with its "severe restrictions on movement and deprivations of sanitary, healthful conditions," and the shackling at issue in *Youngberg* v. *Romeo*, indicating that either can be "justified only by a 'compelling necessity' or by showing that it was 'the least restrictive method of dealing with

[2] The court addresses the same issue at several other points in the opinion. Pet. App. 27a ("hospital was required to demonstrate that it had considered alternative security accommodations for [respondent] and to explain why it had found them inadequate") and Pet. App. 31a ("hospital officials [must] have considered the existing alternative residences and found that no less restrictive setting would be sufficient to secure adequate protection from threatened harm.") It is not clear whether the reference to "existing" residences is intended to suggest that the states' obligation stops short of constructing new, less restrictive facilities. If new facilities are not required, then the existence of a personal right to the least restrictive environment would seem determinable only a first-come, first-served basis.

the patient in light of his problems and the surrounding environment.'" Pet. App. 28a.

The court also seems to declare that certain forms of treatment must be the least restrictive available. In *Youngberg* v. *Romeo*, the court ordered that any treatment decision involving "significant deprivations of liberty" be allowed only if it "provided for the least instrusive treatment available under the circumstances." *Youngberg* Pet. App. 47a.[3] Although that case involved only the mentally retarded, the court in this case concluded that "the analysis of [*Youngberg* v. *Romeo*] is for fourteenth amendment purposes equally applicable to the involuntarily committed mentally ill." Pet. App. 17a.[4]

In our view, the emphasis on least restrictive conditions and least restrictive treatment, while serving to tie the decisions below to some recognized precept of due process law, is ultimately confusing and unsound. The degree of restrictions placed on a mentally-ill or mentally-retarded resident cannot be isolated from professional decisions about the proper course of treatment and, in the end, the most desirable allocation of resources among competing ends. As a practical matter, it is not at all clear that the notion of least restrictive treatment provides any useful guidance to those entrusted with care of the mentally-ill or mentally-retarded; it is more likely, in fact, that it provokes a sense of uncertainty and risk-aversion that may impede effective treatment. Nor is it clear that, once states have corrected the intolerable conditions existing at some institutions, the population of mentally-ill and mentally-retarded is best served by an additional constitutional requirement that the states pro-

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[3] Other treatments must be shown to be "acceptable in light of present medical or other scientific knowledge." *Youngberg* Pet. App. 47a.

[4] The court below, in quoting from the charge approved in the *Romeo* decision, omitted the subsection dealing with least restrictive treatment. Pet. App. 17a n.6. The omission is not explained.

vide the least restrictive environment for those whom it chooses to treat. To lock those views into place, as a matter of constitutional law, is an unnecessary limitation on professional judgment.

As we said in our *Romeo* memorandum, it also seems anomalous that the provision of acceptable medical treatment or decent housing and care nevertheless can offend the liberty interests of institutionalized persons. It seems more reasonable to recognize that a broad range of permissible treatment and restriction, left largely to the professional discretion of the staff, is inherent in the original commitment to a state facility. In our view, that range is not, and should not be, so broad as to encompass unsanitary conditions, gross deprivations of food and clothing, or the absence of meaningful treatment or habilitation efforts. However awkwardly the principles of substantive due process may apply, it is right to declare that the states, having taken persons involuntary into their custody because of a mental condition, cannot then simply ignore either the wellbeing of the persons themselves or the conditions giving rise to their commitment. But it is a very different matter to say that due process forces the states to choose between providing the least restrictive care and treatment or no care and treatment at all. In our view, the proper constitutional standard lies somewhere in between.

2. The court below also carries forward the notion, evidenced in *Youngberg* v. *Romeo* as well, that individual employees may be held liable for institutional deficiencies even though they have no real power to correct them. We continue to believe that the definition of a constitutional tort, or the defense of good-faith immunity, must be flexible enough to prevent the imposition of liability on persons without fault. *Youngberg* Mem. 12-15. At present, this seems not to be the case.

The Third Circuit tackles the issue somewhat obliquely, suggesting that the fault of the defendants in this case

lies in their failure to move respondent from conditions known to be intolerable. Even leaving aside the fact that the state courts refused to require a move, it seems evident that the fault as defined by the court of appeals is somewhat illusory. Whatever petitioners might have done for respondent, there is little in his theory of the case that distinguishes him from many other residents of Vroom or, in some respects at least, from other mentally-ill persons institutionalized in New Jersey. Petitioners could not have moved *everyone* in the same situation, or provided them with additional treatment, without rapidly exhausting the inadequate resources made available to them. It would be short-sighted, therefore, to hold them liable in damages for what amounts a claim of inadequate favoritism. The root of the problem lies with the state legislatures, not with the individuals carrying out their programs. *See Parratt* v. *Taylor*, No. 79-1734, decided May 18, 1981, 49 U.S.L.W. 4509, 4515 n. 8 (Powell, J., concurring in the judgment).

To impose personal liability for institutional defects thus leads to an unfair result.[5] Although many states presumably indemnify their employees, the decision to do so is wholly at the discretion of the states. At best, therefore, the states merely deflect a bullet aimed at the wrong target. Moreover, the fairness of the personal liability doctrine then depends, in fact if not in law, upon an end run around the Eleventh Amendment. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974). It seems preferable to face the problem directly, rather than to avoid it by this haphazard process.

3. We believe that prompt review of these issues is appropriate, particularly in light of the grant of cer-

[5] We do not question that some suits may involve the deliberate, affirmative denial of rights to institutional residents. Those cases are a different matter. The discussion in this section pertains only to suits based on systemic deficiencies, usually arising out of inadequate funding.

tiorari in *Youngberg* v. *Romeo*. Employees in the Third Circuit must now work in the wake of decisions which, taken together, require compelling reasons for shackling and functional equivalents, a showing that shackling or chosen places of confinement are the least restrictive forms of care available, proof of substantial necessity for failure to prevent injuries, a showing that treatment generally meets accepted medical standards, and, finally, a showing that some treatments are the least restrictive possible even though they may be otherwise acceptable. These complex standards, somehow divined from the sparse language of the Due Process Clause, are hard to understand and hard to follow. Yet, employees in the Third Circuit must apply them in the face of inadequate funding and at the risk of personal liability. A grant of certiorari in this case will allow the Court to consider these issues in their entirety.

We also suggest that the Court will benefit from addressing the problems of the mentally-ill and the mentally-retarded together. Although there are differences between the two populations, their problems with inadequate care and inadequate treatment or habilitation have significant overlap. Moreover, in a world of limited resources, the mentally-ill and mentally-retarded necessarily tend to compete for state funds. To the extent that their constitutional claims on such funds are identical, it makes sense to define those claims at the same time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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